IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 18.

UNION PACIFIC RAILROAD COMPANY,
Appellant,

vs.

MASON CITY AND FORT DODGE RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is a suit in equity brought by the Mason City & Fort Dodge Railroad Company, a corporation organized under the laws of the State of Iowa, appellee, against the Union Pacific Railroad Company, a corporation organized under the laws of the State of Utah, appellant, in which appellee prayed for a decree ordering appellant to admit appellee into the full, equal and joint use with other railroad companies of the main and passing tracks of appellant then located or established between the eastern terminus of appellants' tracks in the

City of Council Bluffs, Iowa, and the City of South Omaha, Nebraska, including the bridge over which said tracks extend across the Missouri river between the cities of Council Bluffs and Omaha; also of the side and spur tracks leading from the main tracks; also of the passenger station of appellant in the City of Omaha, and tracks and facilities connected therewith, and in general all of the tracks and side-tracks, stations and terminal facilities belonging to the appellant at and between the cities of Council Bluffs, Iowa, and Omaha, and South Omaha, Nebraska (Record, p. 61).

To enable this Court to more clearly understand this matter, a brief history of the formation of the various companies owning the properties in question at different times and of the facts leading up to the present controversy, may be of value.

Upon July 1, 1862, there was incorporated under Act of Congress the original company, called *The* Union Pacific *Railroad* Company, which will be hereinafter referred to as the First Pacific Company (12 U. S. Stat., 489). Upon January 24, 1880, this original company was consolidated with companies owning other lines, and the consolidation became known as the Union Pacific Railway Company, hereinafter called the Second Pacific Company. During the year 1897, there was incorporated under the laws of Utah the Union Pacific Railroad Company, the appellant herein.

The First Pacific Company was given a grant of lands and a bonus of $16,000 per mile in Government bonds, under the Incorporation Act. On March 7, 1864, President Lincoln fixed as the eastern terminus

of the Union Pacific Railroad "a point on the *western boundary of the State of Iowa* east of and opposite to the east line of section 10, in township 15, north of range 13, and east of the 6th principal meridian in the Territory of Nebraska" (Record of Pleadings, p. 6).

On July 2, 1864, there was passed an act, giving in section 10 thereof the First Pacific Company the right to execute a first mortgage on its said railroad which should be prior to the Government lien, for the same amount as the Government subsidy bonds (13 U. S. Stat., 356, 360).

Under the Acts of July 1, 1862, and July 2, 1864, and upon March 1, 1865, there was placed upon the line of the company what is known as the Union Pacific First Mortgage, which is referred to on page 591 of the Record, Evidence, Vol. II. This mortgage covered all the company's property, including all bridges along the company's line, already built, or which might thereafter be built, for the use of the said railroad, and since the Missouri River bridge in question was constructed as a part of the Union Pacific Railroad in its entirety, the said bridge was covered by the terms of said First Mortgage. The construction of the bridge was commenced in the year 1869 under the original grant from Congress. This court so definitely decided in the case of *Union Pacific R. R. Co. vs. Hall*, 91 U. S., 343, 352:

> "It seems to be clear that the bridge over the river, built by the railroad company, is a part of their railroad, and required by law to be so operated. It was commenced in 1869 under the acts of 1862 and 1864."

After the First Mortgage was placed upon the property and the road as an entirety, and after the commencement of the construction of the bridge, and after the sale of all the First Mortgage bonds above referred to (see Opinion of Judge SANBORN in Union Pacific foreclosure suit, Record Evidence, page 352), it was found that additional funds would be necessary to complete the construction of the bridge, and the company sent Grenville M. Dodge and others to Washington, and they procured the passage of the Act of February 24, 1871, under which the company mortgaged the bridge separately from the rest of the company's property, and raised the necessary money with which to complete it.

This act is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; and *for the use and protection* of said bridge and property, the Union Pacific Railway Company shall be empowered, governed, and limited by the

provisions of the act entitled, 'An act to authorize the construction of certain bridges, and to establish them as post roads,' approved July twenty-five, eighteen hundred and sixty-six, *so far as the same is applicable thereto: And provided*, That nothing in this Act shall be so construed as to change the *eastern terminus* of the Union Pacific railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligation as established by existing laws: *Provided, also*, that Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: *Provided*, That if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw" (16 Stat., 430).

The above act declares that "*for the use and protection* of said bridge and property the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges and to establish them as post roads', approved July twenty-five, eighteen hundred and sixty-six, *so far as the same is applicable thereto*", which act is found in 14th Statutes, 244, and related to the building of certain bridges across the Mississippi and Missouri rivers. Said act is as follows:

ACT OF JULY 25, 1866.

CHAPTER CCXLVI.

An act to authorize the construction of certain bridges and to establish them as post roads.

Bridge may be built across the Mississippi River at Quincy, Illinois, and railroad tracks laid thereon.

Trains may cross for compensation.

Question of obstruction to navigation may be tried where.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri, for such purpose, to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches.

Bridge may be built with draw or unbroken spans.

SEC. 2. *And be it further enacted*, That any bridge built under the provisions of this act may, at the option of the company building the same, be built as a drawbridge, with a pivot or

Height, if made with unbroken spans. Length of spans.

other form of draw, or with unbroken or continuous spans: *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above the extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length: *And, provided, also*, That if any bridge built under this act shall be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river: *And, provided also*, That said draw shall be opened promptly upon reasonable signal for the passage of boats, whose construction shall not be such as to admit of their passage under the permanent spans of said

Pivot drawbridge, with draw over main channel, and spans, etc.

Draw to be opened promptly, except, etc.

bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

Bridges constructed according to this act to be lawful structures and post routes.

Sec. 3. *And be it further enacted*, That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

Rates of toll.

Chicago, Burlington & Quincy Railroad Company may build a railroad bridge across the Mississippi, etc.

Sec. 4. *And be it further enacted*, That it shall be lawful for the Chicago, Burlington and Quincy Railroad Company, a corporation whose road has been completed to the Mississippi River, and connects with a railroad on the opposite side thereof, having first obtained authority therefor from the States of Illinois and Iowa, to construct a railroad bridge across said river upon the same terms, in the same manner, under the same restrictions, and with the same privileges, as is provided for in this act in relation to the bridge at Quincy, Illinois.

Bridge may be built across the river at Hannibal, Missouri.

Sec. 5. *And be it further enacted*, That a bridge may be constructed at the town of Hannibal, in the State of Missouri, across the Mississippi River, so as to connect the Hannibal and St. Joseph Railroad with the Pike

County and Great Western railroads of Illinois, on the same terms and subject to the same restrictions as contained in this act for the construction of the bridge at Quincy, Illinois.

Between Prairie du Chien and North McGregor.

Sec. 6. *And be it further enacted*, That a bridge may be constructed across the Mississippi River between Prairie du Chien, in the State of Wisconsin, and North McGregor, in the State of Iowa, with the consent of the legislatures of Wisconsin and Iowa, on the same terms and subject to the same restrictions as are contained in this act for the construction of the bridge at Quincy, Illinois.

Between Keokuk and Hamilton.

Sec. 7. *And be it further enacted*, That the Keokuk and Hamilton Mississippi Bridge Company, a corporation existing under the laws of the State of Iowa, and the Hancock County Bridge Company, a corporation existing under the laws of the State of Illinois, be and are hereby authorized to construct and maintain a bridge over the Mississippi River between Keokuk, Iowa, and Hamilton, Illinois, of the same character, description, and construction as provided in this act for the bridges at Quincy and Burlington; and the said bridge, in its use and operation, shall be subject to the same restrictions that apply to said bridges at Quincy and Burlington by the terms of this act.

Between Winona and opposite bank of river, if, etc.

Sec. 8. *And be it further enacted*, That the Winona and Saint Peter Railroad Company, a corporation existing under the laws of the State of Minnesota, is hereby authorized

to construct and operate a railroad bridge across the Mississippi River between the city of Winona, in the State of Minnesota, and the opposite bank of said river in the State of Wisconsin, with the consent of the legislatures of the States of Minnesota and Wisconsin; and said bridge by this section authorized is hereby declared a post route, and subject to all the terms, restrictions, and requirements contained in the foregoing sections of this act.

This bridge made a post road.

Between Dunleith and Dubuque, if, etc.

Sec. 9. *And be it further enacted*, That a bridge may be constructed and maintained across the Mississippi River, between Dunleith, in the State of Illinois, and Dubuque, in the State of Iowa, with the consent of said States previously given or hereafter acquired, with the same privileges, upon the same terms, and under the same restrictions as are contained in this act for the construction of a bridge at Quincy, Illinois.

At the City of Kansas.

Sec. 10. *And be it further enacted*, That any company authorized by the legislature of Missouri may construct a bridge across the Missouri River at the City of Kansas, upon the same terms and conditions provided for in this act.

Between the City of St. Louis and East St. Louis.

Sec. 11. *And be it further enacted*, That the 'Saint Louis and Illinois Bridge Company,' a corporation organized under an act of the general assembly of the State of Missouri, approved February fifth, eighteen hundred and sixty-four, and an act amendatory of the same, approved February twentieth, eighteen hundred

and sixty-five, and also confirmed in its corporate powers under an act of the legislature of the State of Illinois, approved eighteen hundred and sixty-four, or any other bridge company organized under the laws of Missouri and Illinois, be, and the same is hereby empowered to erect, maintain and operate a bridge across the Mississippi River, between the City of Saint Louis in the State of Missouri, and the City of East Saint Louis, in the State of Illinois, subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following terms and provisions contained in this act. And in case of any litigation arising from any obstruction or alleged obstructions to the free navigation of said waters, the cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches.

Question of obstruction where may be tried.

Sec. 12. *And be it further enacted*, That the bridge authorized by the preceding section to be built shall not be a suspension bridge, or draw-bridge, with pivot or other form of draw, but shall be constructed with continuous or unbroken spans, and subject to these conditions: First, that the lowest part of the bridge or bottom chord shall not be less than fifty feet above the city directrix at its greatest span. Second, that it shall have at least one span five hundred feet in the clear, or two spans of three hundred and fifty feet in the clear of abutments. If the two latter spans be

Bridge to be built with unbroken spans.

Conditions, height and length of spans.

used, the one over the main steamboat channel shall be fifty feet above the city directrix, measured to the lowest part of the bridge at the centre of the span. Third, no span over the water at low-water mark shall be less than two hundred feet in the clear of abutments.

Act may be altered, etc.

Sec. 13. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

Approved, July 25, 1866.

As will be perceived, said act contains certain general provisions applicable to all the bridges referred to therein, and also contains special provisions governing certain of the bridges mentioned in the act. The general provisions found in said act and which may be deemed applicable to the Union Pacific bridge in question, are as follows:

Bridge may be built with draw or unbroken spans.

Sec. 2. *And be it further enacted*, That any bridge built under the provisions of this act may, at the option of the company building the same, be built as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the

Height, if made with unbroken spans. Length of spans.

spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length: *And, provided, also*, That if any bridge built under this act be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river: *And, provided also*, That said draw shall be opened promptly upon reasonable signal for the passage of boats, whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after passage of trains.

Pivot drawbridge, with draw over main channel and spans, etc.

Draw to be opened promptly, except, etc.

Sec. 3. *And be it further enacted*, That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a

Bridges constructed according to this act to be lawful structures and post routes. Rates of toll.

post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

Approved, July 25th, 1866.

Subsequent to the passage of said Bridge Act of 1871, and on April 24, 1871, the First Pacific Company mortgaged the bridge and its approaches as authorized by said act. The first recital in the Bridge Mortgage is as follows:

"Whereas, By an Act of Congress of the United States, approved 22nd day of February, 1871, the company is authorized to construct a bridge and railroad line across the River Missouri, *between Omaha, in the State of Nebraska, and Council Bluffs, in the State of Iowa*, and to issue such bonds, not exceeding two millions and a half of dollars, as it might deem needful for that purpose, and to secure the same by mortgage on the bridge and its approaches and appurtenances" (Record of Pleadings, p. 66).

The property covered by that mortgage is described as follows:

"All and singular, the said bridge over the River Missouri, between Omaha and Council Bluffs, and the approaches thereof, and the appurtenances belonging thereto, including all parts and portions of the said bridge *now constructed* or hereafter to be constructed, and the depots at Council Bluffs and Omaha as aforesaid, and the lines and tracks

required *to perfect the said bridge*, ITS APPROACHES AND APPURTENANCES, and to connect the same with the neighboring lines included in this conveyance as well the lines and tracks now constructed as those which may hereafter be constructed, and also all estates, terms and rights of way of the said bridge, approaches and appurtenances, as well now held by the company as to be hereafter acquired by it, and all the rights and privileges of the said company of, in or to the said bridge, approaches or appurtenances, or touching, concerning or appertaining to the maintenance, use and occupation thereof" (Record of Pleadings, p. 74).

After the consolidation the Second Pacific Company, made a Renewal Bridge Mortgage, dated October 1, 1885, in practically the same form as the original mortgage.

During the years from 1868 to 1872, the City of Omaha and the County of Douglas, Nebraska, donated to the First Pacific Company certain bonds to aid it in the construction of its bridge, approaches, depots and tracks connected therewith, and upon February 2, 1872, there was recorded a deed from one Alvin Saunders, Trustee, to the First Pacific Company, conveying certain depot property in the City of Omaha, Nebraska, which the said Saunders had held as a naked trustee for the said First Pacific Company, and these grounds described in said Saunders deed have been used as a part of the depot grounds, yards, terminal facilities and approaches, at Omaha, between the west end of the bridge and a point known as the Junction Point at or near 20th Street in the City of Omaha.

In the Saunders deed there appears what has been designated as a "Tripartite Agreement," which agreement is found in Record of Pleadings, pages 20 to 25, inclusive.

In the Saunders deed after the granting clause is found the following provision, to wit:

> "Hereby limiting the use of all said premises to the legitimate purposes of depot and transfer grounds and grounds for right of way and approaches to the said Missouri River Bridge, subject to the conditions and restrictions contained in the contract above recited, and provided further, that in case said premises, or any part thereof, be abandoned or disused or converted to any other than the uses and purposes hereinbefore limited, then the same shall revert to and become the property of the said City of Omaha" (Record of Pleadings, p. 29).

On May 1, 1890, the Second Pacific Company entered into contracts with the Chicago, Rock Island and Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, for the term of 999 years, granting to said companies the use of its bridge across the Missouri River, its terminal facilities in Omaha and its tracks from Omaha to South Omaha. Subsequently the Pacific Company refused to carry out the contracts, and suits were brought by the other companies to compel specific performance thereof. Specific performance was decreed by the trial court, and on appeal to this Court the decree was affirmed (*Union P. Ry. Co. vs. Chicago, R. I. & P. Ry. Co.*, 163 U. S., 564).

Subsequently, the present Pacific Company, the

appellant herein, entered into contracts with other railway companies entering Nebraska from Council Bluffs, granting similar privileges, which contracts, however, have no bearing upon the case at bar.

The First Pacific Company built a single-track line from a point which is known as Bridge Junction, and which is about where Twentieth Street in Omaha now is, westward, and in 1871, under the Bridge Act, it completed the construction of the bridge across the Missouri River already commenced and connected the bridge with the Junction at Twentieth Street, and with the eastern terminus of the road at Council Bluffs.

Previous to the completion of the bridge the company transferred passengers and freight between Omaha and Council Bluffs, in the winter by a bridge built upon the ice, and in summer by ferry boats.

In 1883 or 1884 stock yards were established at a point upon the line of the Union Pacific road about two miles below the point known as Bridge Junction or Twentieth Street (Record, Evidence, p. 136), and around these stock yards has grown up the City of South Omaha, Nebraska, until it has become a city of some 30,000 inhabitants. Shortly after the establishment of the stock yards above described, the First Pacific Company constructed a second track from its present station in Omaha to a point adjacent to the stock-yards, and about the year 1890 this track was extended to a small town called Gilmore, which is still the end of the double track, the line beyond that being a single track road.

In 1885 or 1886 the bridge originally constructed

was torn down and a new bridge built upon the same site and a double track laid thereon.

In 1898 the First Mortgage of March 1, 1865, heretofore referred to, was foreclosed. In the foreclosure proceedings there was a contest as to the priority of the lien of that mortgage and the Bridge Mortgage of 1871, on the bridge and appurtenances, and it was decreed that the whole line of road, including the bridge in question, be sold to satisfy the First Mortgage of 1865, but saving the lien of the Bridge Mortgage upon and in respect to the premises covered by said Bridge Mortgage, and to the extent of the indebtedness thereby secured.

Union Pacific Railroad Company, appellant, became the owner of all the properties formerly belonging to the Union Pacific Railroad Company and The Union Pacific Railway Company, by purchase, under the terms and conditions of a decree in said foreclosure proceedings, made and entered in the Circuit Court of the United States in the District of Nebraska, in the case of F. Gordon Dexter and Oliver Ames Second vs. The Union Pacific Railway Company *et al.*, in which the amount due at the time of the sale was something over twenty-seven million dollars.

The mortgage covered the property involved in this suit, and appellant by reason of its purchase at said sale and the deed made in pursuance thereof became the owner of all the property described in the bill, the joint use of which appellee seeks.

Prior to the institution of this suit appellee had requested of appellant permission to use the facilities

demanded in its bill, upon certain terms and conditions, which request appellant refused.

Appellee, therefore, in this suit seeks the aid of a court of equity to compel appellant to enter into contractual relations with it, notwithstanding its unwillingness and refusal so to do.

Appellee bases its claim for this extraordinary and unusual equitable relief, and claims that it has the right to the use of these premises and terminal facilities, on the following grounds:

First. Under and by virtue of the terms of the contract or tripartite agreement entered into between the First Pacific Company and the City of Omaha and County of Douglas, Nebraska, referred to above, and the deed from Alvin Saunders, Trustee, to said Company, executed in accordance with said contract.

Second. Under and by virtue of the two Acts of Congress, approved respectively July 25, 1866 (14 Stats., 244), and February 24, 1871 (16 Stats., 430), and above referred to.

In its answer filed in this cause the appellant relied upon the following defenses:

(1) That the tripartite agreement above referred to became a part of and was merged in the Alvin Saunders, Trustee, deed.

(2) That no advantage could be taken by the appellee of the conditions found in this deed, because:

(*a*) Saunders was a naked trustee, and the City of Omaha was the real party in interest.

(*b*) This was a deed in fee to the Union Pacific Railroad Company, with a condition subsequent in

favor of the City of Omaha, which was the real party in interest.

(*c*) No one but the City of Omaha, the real party in interest, had the right to insist upon the performance of the conditions in said deed, or to enforce the penalty for failure to perform the same, and the City of Omaha was not made a party to the suit.

(*d*) That the limitations and conditions contained in the Saunders Deed were illegal and invalid, and that for this reason appellant took an estate in fee simple free from all conditions and limitations.

(3) That the City of Omaha being the real party in interest, and the party for whose benefit the contract recited in the Saunders Deed was made, appellee would only be incidentally benefited by the performance of the contract, and therefore was not entitled to maintain this suit under said contract.

(4) That neither the Act of Congress approved February 24, 1871, nor any other Act of Congress, required appellant to permit appellee to use said bridge across the Missouri River, or the terminal facilities referred to in the bill.

(5) That appellant, under the proceedings instituted to foreclose the First Mortgage of March, 1865, acquired all the properties of the original, The Union Pacific Railroad Company free and clear of any liens, charges, burdens or duties of or to the United States, or under any Act of Congress, and free and clear of any of the conditions or provisions of the Saunders Deed.

(6) That there was no equity in complainant's bill,

for no necessity existed for the use by appellee of the facilities referred to therein.

(7) That under no circumstances and in no event should appellee be entitled to the use of the facilities in question beyond Twentieth Street, in the City of Omaha, Nebraska, either under the Saunders Deed or the Acts of Congress referred to.

(8) That the appellee had no charter or corporate power or authority to acquire, hold, take, use or exercise any dominion over the properties referred to in the bill.

The issues were properly made up, the testimony taken and the case submitted to the trial court, and on the 12th day of August, 1903, a decree was made and entered in favor of appellee, which is found on page 261 of the Record of Pleadings, by the terms of which appellant was mandatorily ordered and directed to admit appellee to the full, equal and joint use of all of the properties described in the bill of complaint. The opinion of the trial court is found on page 252 of the Record of Pleadings.

Thereupon an appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit from said order and decree, and on the 29th day of February, 1904, an opinion of said court was filed affirming the opinion of the trial court (Record of Pleadings, p. 277). On the same day a decree was entered affirming the decree of the circuit court, which said decree is found on page 293 of the Record of Pleadings.

Thereupon, an appeal was taken to this Court from said order and decree.

Description of Map.

The red line indicates the road of the Union Pacific built prior to the date of the mortgage of 1865. Under the decision of the court below, the appellee is given the use of this track through South Omaha to Gilmore, about six miles from the bridge. Gilmore is not marked on the map, but is about a mile and a half beyond and to the south of South Omaha. The tracks, passing tracks, etc., between the approaches to the bridge and the town of Gilmore amount in the aggregate to about eighty (80) miles of track, the use of which is given to appellee against the will of the appellant by the decree of the court below.

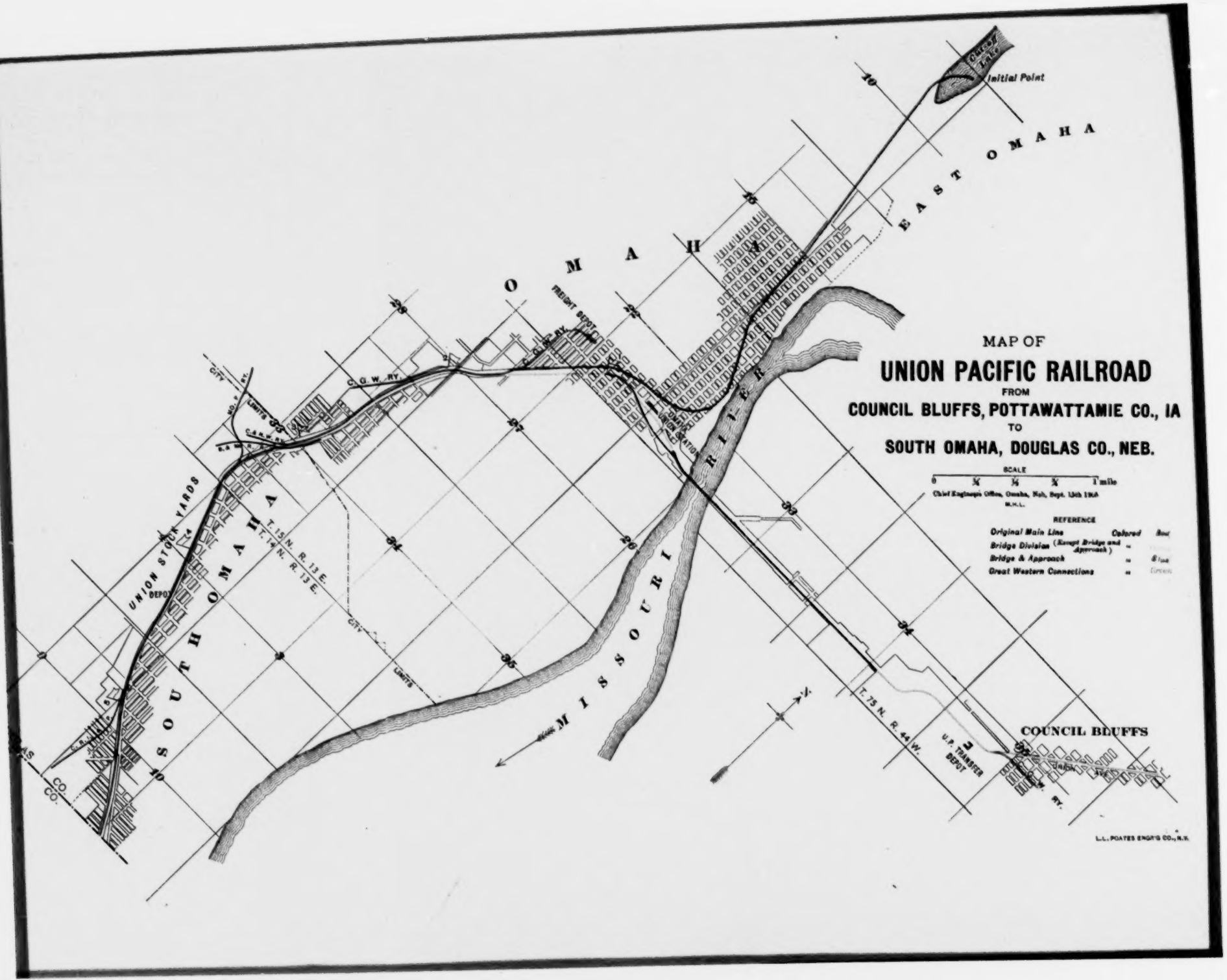
The blue line indicates the bridge and approaches.

The yellow line on the Iowa side indicates the tracks, etc., at the station at Council Bluffs.

The yellow line on the Nebraska side indicates the tracks at the station and yard between the approaches to the bridge and the junction with the main line at 20th Street.

The green line indicates the tracks owned by the appellee.

CITY
NO. LIMITS
UNION STOCK YARDS
DEPOT
SOUTH OMAHA
T. 15 N. R. 13 E.
T. 14 N. R. 13 E.
DOUGLAS
SARPY
CO.
CO.


Initial Point
EAST OMAHA
OMAHA
SOUTH OMAHA
MISSOURI RIVER
MAP OF
UNION PACIFIC RAILROAD
FROM
COUNCIL BLUFFS, POTTAWATTAMIE CO., IA
TO
SOUTH OMAHA, DOUGLAS CO., NEB.
SCALE
0 ¼ ½ ¾ 1 mile
REFERENCE
Original Main Line Colored Red
Bridge Division (Except Bridge and Approach) "
Bridge & Approach " Blue
Great Western Connections " Green
UNION STOCK YARDS
UNION DEPOT
C. G. W. RY.
FREIGHT DEPOT
CITY LIMITS
T. 15 N. R. 13 E.
T. 14 N. R. 13 E.
T. 75 N. R. 44 W.
U.P. TRANSFER DEPOT
COUNCIL BLUFFS
L.L. POATES ENGR'G CO., N.Y.

Specification of Errors.

Appellant alleges that the Circuit Court of Appeals erred in the following particulars and specifies errors as follows:

I.

In affirming the decree of the court below.

II.

In not reversing the decree of the court below and remanding this cause, with directions to dismiss complainant's bill.

III.

In holding that the Union Pacific Railroad Company was required under the acts of July 1, 1862, July 2, 1864, July 25, 1866, and February 24, 1871, to permit the Mason City & Fort Dodge Railroad Company to use its bridge across the Missouri River between the cities of Council Bluffs, in the State of Iowa, and Omaha, in the State of Nebraska, together with all tracks, side tracks, spur tracks, facilities, etc., and that the Mason City & Fort Dodge Railroad Company was entitled to the full, equal and joint use with other railroads of said bridge and tracks.

IV.

In holding that the Mason City & Fort Dodge Railroad Company was entitled under said acts to go over and across the bridge of the Union Pacific Railroad Company, and to use with other railroads the main and passing tracks of the appellant, located or established or to be located and established between the City of Council Bluffs, in the State of Iowa, and the City of South Omaha, in the State of Nebraska, and also the terminal facilities in said cities.

V.

In holding that the Mason City & Fort Dodge Railroad Company was entitled to the use of the tracks and terminal facilities of the Union Pacific Railroad Company beyond and west of Twentieth Street in the City of Omaha, Nebraska.

VI.

In holding that the Mason City & Fort Dodge Railroad Company possessed the same right to enforce the provisions of the act of Congress of February 24, 1871, against the Union Pacific Railroad Company, the appellant in this case, as it would have possessed against the original Congressional corporation entitled the Union Pacific Railroad Company and the consolidated corporation known as the Union Pacific Railway Company.

VII.

In holding that the appellant did not under the foreclosure of the first mortgage of March 1, 1865, acquire all of the properties of the old company, to-wit, the Union Pacific Railroad Company, a congressional corporation, free and clear of any lien, charge or duty of or to the United States of America, under any act of Congress of the United States except as specified in the decree of foreclosure entered in said cause in the Circuit Court of the United States for the District of Nebraska, July 9, 1897.

VIII.

In holding that the Mason City & Fort Dodge Railroad Company was entitled to use, or to the right to use, and occupy any of the premises of the Union Pacific Railroad Company upon the terms of the contracts, or any of them, between the said Union Pacific Railroad Company and other railroad companies.

IX.

In holding that any necessity existed for the use by the Mason City & Fort Dodge Railroad Company of the bridge across the Missouri River and the other properties of the Union Pacific Railroad Company for an entrance to the City of Omaha, Nebraska.

X.

In refusing to hold that the Mason City & Fort Dodge Railroad Company had no corporate power or authority to use or exercise any dominion over property in the State of Nebraska, and, therefore, had no power or authority or right to use any of the property in the State of Nebraska of the Union Pacific Railroad Company.

XI.

In refusing to hold that no advantage could be taken by the Mason City & Fort Dodge Railroad Company of the conditions found in the Alvin Saunders deed.

XII.

In refusing to hold that the limitations and reservations in the Alvin Saunders deed to the Union Pacific Railroad Company, the original Congressional corporation, were invalid and not binding upon the appellant.

XIII.

In refusing to hold that the City of Omaha was the real party in interest for whose benefit the contract recited in the Alvin Saunders deed was made; that the Mason City & Fort Dodge Railroad Company would only be incidentally benefited by the enforcement of said contract; and that, therefore, it is not entitled to maintain this suit under said contract.

ARGUMENT.

FIRST POINT.

No authority was conferred by the acts of Congress of July 1, 1862, July 2, 1864, July 25, 1866, and February 24, 1871, upon the Mason City & Fort Dodge Railroad Company to use the Missouri River bridge and the tracks of the appellant Union Pacific Railroad Company, and under no aspect of this case can this question, or any of the questions involved herein, be deemed to be disposed of by reason of the decision of this Court in the case of Union Pacific Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co., 163 U. S., 564.

For the first time in the history of this litigation we have reached a court where the questions involved can be heard upon their merits. Both in the Circuit Court and the Circuit Court of Appeals we have been met with the statement that those courts are precluded from an investigation of the questions involved by reason of the opinion of this Court in the case of the *Union Pacific Railway Co. vs. Chicago, Rock Island & Pacific Railway Co.*, 163 U. S., 564.

The single question in the Rock Island case was whether the Union Pacific could be compelled to perform a contract which it had voluntarily entered into, permitting the Rock Island to use its bridge and tracks.

The single question in the case at bar is whether the Union Pacific can be compelled to make such a contract against its will with the Mason City Company.

It is not clear how the decision in the former case can be considered as controlling in this case, when the

question presented in the Rock Island case is of such an entirely different character from that which arises in the present controversy.

SANBORN, Circuit Judge, delivering the opinion of the Circuit Court of Appeals, said (Record, p. 286):

> "The considerations to which reference has now been made have forced our minds irresistibly to the conclusion that the question whether or not the Pacific Railroad Acts relating to the Omaha bridge imposed upon the Union Pacific Railway Company the duty to grant to the Rock Island Company and to other companies like the respondent, which are similarly situated, the joint and equal use of its transportation facilities described in the decree below, not only between Council Bluffs, and Omaha, but also between Omaha and South Omaha, has been conclusively determined by the decision of the Supreme Court in the Rock Island case, and that it is not open to our consideration or decision. The clear declaration of the opinion of the Supreme Court upon this question, in the Rock Island case, does not appear to us to be the mere *obiter dictum* of the Chief Justice who wrote it, and even if we are in error in this conclusion, the declaration of that fact and the reversal of the decision there expressed will come with much better grace from the Court which delivered the opinion, to which this case is removable by appeal, than from an inferior court, which ought not to presume even when the answer to the question is doubtful, that the court whose decisions advise and control its determinations has unnecessarily or unadvisedly determined a question which was not lawfully presented for its consideration."

Also at page 292:

> "The result of the whole matter is that under the opinion of the Supreme Court in Union Pacific Railway Co. vs. Chicago, etc., Ry. Co., 163 U. S., 564, 586, to the effect that the appellant in that case owed to the Rock Island Company the duty, under the Pacific Railroad acts relating to the Omaha bridge, to permit it to use the very facilities in question in this case, an opinion which this court, for reasons which have been fully stated, does not feel at liberty to criticise or disregard, there is no escape from the conclusion that the appellee is entitled to the relief granted to it by the decree below."

It, therefore, becomes necessary at the outset of this discussion to consider to what extent the opinion in the Rock Island case should govern in the case at bar.

The Opinion in the Rock Island Case.

This was a case in equity brought by the Rock Island and Milwaukee companies against the Second Pacific Company to compel the specific performance of two contracts, dated May 1, 1890, and April 30, 1890, respectively. In the pleadings there is no reference whatever to the Bridge Act of 1871 or the act referred to therein of 1866. The bill of complaint is based upon the contract between the parties and no claim whatever is made under the Acts of Congress of 1871 and 1866. The answer set up that such contract was *ultra vires* and would impair the ability of the Union Pacific to discharge its duty to the public. The ordinary general replication to the answer was filed by the complainant. It will be seen that there is no suggestion whatever in

the pleadings of the questions presented in the case at bar. The case was first tried before Mr. Justice BREWER, and is found reported in 47 Fed. Rep., p. 15.

Summing up the case as presented to him, Mr. Justice BREWER says (p. 17):

> "Four questions have been presented, and argued with distinguished ability. They are—first, was the instrument, as thus signed and attested, so authorized and executed as to become and be a contract of the corporations? Second, if it was so authorized and executed, was it *ultra vires?* Third, if not *ultra vires*, is it a contract of which a court of equity may compel specific performance, and, fourth, if it may, ought specific performance to be decreed?"

He then proceeds to decide the case, and no other questions are hinted at or discussed. There was no construction of any statutes asked or urged at the hearing, nor is there the slightest hint that any duty other than the obligation of fulfilling the contract rested upon the Pacific Company.

From this decision an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, the opinion being found in 51 Fed. Rep., 309. In this case SANBORN, Chief Justice, reading the opinion, affirms the finding of Justice BREWER, and going a step further, in discussing the purpose and policy of Congress, says (p. 323):

> "An examination of these statutes clearly shows that the purpose and policy of the Congress has been constantly to promote, and often to require, the formation and operation of continuous lines of transportation; that *almost without* exception, it

has authorized and *generally* has required, the owners of railroad bridges built under its authority to allow the use of their bridges and tracks for the passage of trains of connecting companies. It is seen that the Bridge Act of 1866, by which the Pacific Company, so far as the same was applicable, was 'empowered, governed and limited,' for the use and protection of its Omaha bridge, was an act whose restrictions and conditions have been made applicable to at least eight bridges; and that the expressed purpose of the Act of February 24, 1871, was 'for the more perfect connection of any railroads that are or shall be constructed to the Missouri river.'"

And so, not holding that the Act of 1871 imposed the obligation, but "reading the charter of the company in the light of the general legislation," referred to in the opinion, the Court declares that "we are constrained to hold that the Union Pacific Railway Company was thereby *fairly empowered to make this contract.*"

From that court an appeal was taken to this Court, and here the rights of the Rock Island and Milwaukee companies, under the contracts, were finally established, this Court holding that the Pacific Company had the right and authority to make the contracts, and using the following language (163 U. S., 564, 585):

"We think that it would be carrying the doctrine of *ultra vires* much too far to deny absolutely the competency of a railroad company, being a public highway, whose use is common to all citizens, to contract to give another running rights over its tracks *without express statutory authority*, AND that, under proper circumstances, such a contract may well be held within its implied powers."

This fully and finally disposed of the contention raised by the Pacific Company, and the case was at an end. But in the opinion there was added the following paragraph, which has proved a stumbling block to the hearing of the case at bar upon its merits (pp. 585, 586):

> "But the determination of the existence of the power to grant running rights in this instance does not rest on these considerations alone. For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation, imposed on the Pacific company the duty of permitting the Rock Island company to run its engines, cars and trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included."

We insist that an examination of the record will show conclusively that this statement and the argument in support thereof were not authoritative or binding on the Court, and must be treated as *obiter dicta.*

Chief Justice MARSHALL, in *Cohens vs. Virginia*, 6 Wheat., 264, said (p. 399):

> "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the

case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Harriman vs. Northern Securities Co.*, 197 U. S., 244, 291, it was held by this Court to be the settled rule,—

> "that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits."

Passing upon these statements in this opinion, when this case was submitted to Judge MUNGER, the latter said in his opinion, found on page 257 of the Record:

> "The question as to whether the Union Pacific could be required against its will to enter into any character of a contract with another railroad company for the use of the bridge and tracks was not before the court in the Rock Island case. It was not necessary to be considered for a correct determination of the question submitted, and hence, the expression before quoted in the opinion of the Chief Justice, that the bridge act imposed upon the Union Pacific Company the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and tracks between Council Bluffs and South Omaha, is not authority but *dicta*, which while it should be respected, is not to control the judgment in this case."

As heretofore suggested, any reference to the Act of 1871 was entirely unnecessary, as the court had already determined the controversy and found that the Pacific Company had the implied power under its charter to make the contracts which were the basis of the suit. The writer's reference to the Act of 1871 was simply an attempt, suggested probably by Judge SANBORN'S

language heretofore quoted, to show that therein the Union Pacific was granted express statutory authority to make the contract in question, but it is quite apparent that if the company had the implied power, express statutory authority was unnecessary, and the discussion on that point must be treated as *obiter dicta*, and not binding on the court as a whole, but simply the private opinion of the Justice delivering the opinion. In addition this branch of the matter was touched on but lightly by both the court and the attorneys in their arguments. The court devoted but few pages to the discussion of it, and the attorneys but little more. On reading the statement in the opinion of this Court in the Rock Island case that the matters provided for in the second and third sections of the Act of 1866 were otherwise fully covered in the Pacific Railroad Acts, we carefully examined the briefs submitted to the Court in that case to find if the points we urged were presented to the Court in connection with the construction of the Act of 1871, and we find that they were not urged by counsel or considered by the Court.

This is all the more apparent when we consider the dissenting opinion filed by Justices SHIRAS and GRAY, and found on page 604 of the Rock Island case. Had the question of the duty and obligation of the Pacific Company to turn over the use of the tracks, depots and bridge to another company been discussed or considered by the Court, and had it been decided by the Court that this duty and obligation was imposed by this act, then there would have been absolutely no basis for the dissenting opinion, and had this matter been in dispute by the Court, and the majority of the Court been against

Justices SHIRAS and GRAY, then of necessity their first endeavor in the dissenting opinion must have been to show that no such duty and obligation rested upon the company under the Act of 1871. On the contrary, however, we find this language in the dissenting opinion (pp. 606, 607):

> "The doctrine of those cases may be sufficiently expressed by the following paragraph taken from the opinion of Mr. Justice MILLER in the case of Pennsylvania Railroad vs. St. Louis, &c., Railroad, 118 U. S., 309:
>
> 'We think it may be stated as the just result of these cases and on sound principle that, unless *specially authorized by its charter or aided by some other legislative action*, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.' To which may be added the following observations of Mr. Justice GRAY, in the very recent case of Central Transportation Co. vs. Pullman's Car Co., 139 U. S., 48: 'The clear result of these decisions may be summed up thus: The charter of a corporation read in the light of any general laws which are applicable is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those

powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and above all the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

This shows most conclusively that the Court never found or determined that this duty or obligation "*was specially authorized by its charter or aided by other legislative action.*"

The peculiar circumstances under which the Act of 1871 was passed was not brought to the Court's attention, nor was the point pressed on them that at that time it was strongly contended that the bridge would not constitute a part of the Union Pacific Railroad when completed, and therefore not subject to be used by the United States Government as a post route. If this point had been urged upon the Court, and this reason presented why it would be expedient for Congress, out of abundant caution, to incorporate in the Act of 1871 a reference to the Act of 1866, so as to make certain, irrespective of the final result of the contention as to where the eastern terminus of the Union Pacific was, that the bridge would be available to the Government, no doubt it would have been very apparent to the Court that the reference was intended to cover Sections 2 and 3 and was a very reasonable and natural precaution.

It was necessary in order to have any basis for the statement that it was the duty of the Union Pacific to permit the Rock Island Company to cross the bridge

under the Acts of the Congress of the United States, to show that the reference in the Act of 1871 to the Act of 1866 was not to the general provisions, to wit, Sections 2 and 3. The opinion endeavored to eliminate these sections by saying that the matters embodied therein were fully covered by the Pacific Railroad Acts of 1862 and 1864. A careful examination will show that this is not so.

There are three things covered by Sections 2 and 3 of the Act of 1866:

(1) In connection with the use of the bridges when built as drawbridges.

(2) The protection of the bridges, *i. e.*, that they should be lawful structures.

(3) The *use* of the bridges by the Government—that they should be *post routes.*

There was nothing in the Pacific Railroad Acts relating to the use of the bridge built as a drawbridge, so that this was not fully covered by said Acts, and therefore reference was made to this provision specifying the use of the bridge in case it was built as a drawbridge.

It was provided in the third section, "That any bridge constructed under this Act and according to its limitations, shall be a lawful structure and shall be recognized and known as a post route."

There was no provision in the Pacific Railroad laws declaring that the bridge should be a lawful structure and that it should be a post route. Congress therefore, by way of a reasonable and safe precaution, incorporated these provisions in the Act of 1866 by reference into the Act of 1871.

Post Routes.

The important provision embodied in the third section of the Act of 1866 was that the bridges should be recognized and known as Post Routes. There is no provision in the Pacific Railroad Acts fully, specifically and clearly declaring that the Union Pacific bridge across the Missouri River should be a post route and open to the use of the Government of the United States as such.

It is true that since the decision in the case of *Union Pacific R. R. Co. vs. Hall*, 91 U. S. 343 (decided in 1875), it must be regarded as definitely settled that the bridge across the Missouri River is a part of the Union Pacific Railroad, and built under the original Acts incorporating the company in 1862 and 1864. But before the decision in that case it was a mooted and vexed question. It was contended by many able lawyers that the eastern terminus of the Union Pacific Railroad was at Omaha, Nebraska, and that the bridge was no part of the line and this position was sustained by some very cogent reasoning. In fact, one of the Justices of the Supreme Court of the United States dissented from the majority opinion in the Hall case, *supra*, holding that the eastern terminus of the Union Pacific was at Omaha, Nebraska, and the bridge across the Missouri was no part of the line as originally authorized by Congress.

Mr. Justice Bradley dissenting, said, at page 356:

> "I am obliged to dissent from the judgment of the Court in this case. The Missouri River is, by common acceptation, the western boundary of Iowa;

and the fair construction of the charter of the Union Pacific Railroad Company, which adopts that boundary as its eastern terminus, is, *that the road was to extend from the Missouri River westwardly.*"

In the majority opinion of the Court, delivered by Justice STRONG, the following occurs at page 344:

"The contest in the case does not relate to the existence of this duty; it is principally over the question, *whether the railroad bridge over the Missouri River*, between Omaha in Nebraska and Council Bluffs in Iowa, *is a part of the Union Pacific Railroad; for if it is, there* can be no doubt that the company are required by law to use it in connection with, and as a part of, their entire road, operating all parts together as a continuous line."

It will thus be seen that within a few years of the passage of the Act of 1871, there was a case in the Supreme Court of the United States involving the question as to whether this very bridge was a part of the Union Pacific Railroad at all; that it was vigorously contended by men eminent in the legal profession and supported by able argument, that the bridge was not a part of the Union Pacific Railroad, but separate and distinct from it and not bound by the provisions in the Pacific Railroad Acts of 1862 and 1864, and that one of the Justices of the Supreme Court of the United States held that this contention was well founded in law.

We hardly think, therefore, it can be said, that the use of the bridge as a "post route" was as fully covered by the Pacific Railroad Acts of 1862 and 1864, as might be deemed necessary. It may fairly be said that the

question as to whether the Missouri River bridge, when completed, would be a part of the Union Pacific Railroad, and amenable, therefore, to the provisions of the Pacific Railroad Acts with reference to transportation of the mails, etc., was, in 1871, a fairly debatable one. Now let us see what the position of the Government would be in reference to said bridge, if the contention of the Union Pacific and the holding of Justice BRADLEY was a correct one, and the bridge was not a part of the Union Pacific Railroad.

If it was not a part of the Union Pacific Railroad, and the eastern terminus of the Union Pacific was at Omaha, then of course none of the provisions of the Pacific Railroad Acts of 1862 and 1864 would apply and the Union Pacific would be under no obligations to the United States Government with reference to transporting troops or mails or in any other way. The Government would be absolutely without any claim on the bridge.

With matters in this shape and with this possible or probable contention in view, would it not be a very natural thing for Congress to incorporate in the Act of 1871 some provision so as to remove all doubt on this point and render certain that the United States should have its troops and mails carried over the bridge? This would naturally bring to mind the Act of 1866, in which Congress had incorporated a general provision that all bridges therein named should be "lawful structures, and recognized and known as post routes." The provision that the bridge was to be a "post route," was a provision with reference to the *use* of it, and the

provision that it was to be a "lawful structure" was intended for its *protection* and hence a reference to the Act of 1866, in general terms referring to the clauses bearing on use and protection would be sufficient. So Congress provided that "for the *use and protection* of said bridge and property" the Union Pacific should be empowered, governed and limited by the provisions of the Act of 1866, "so far as the same is applicable" to the use and protection thereof, thereby settling for all time any dispute as to the right of the United States Government to have its mails and troops carried thereover, irrespective of the question whether the bridge was a part of the Union Pacific Railroad or not.

Another consideration, which shows conclusively that Congress, when passing the Bridge Mortgage Act of 1871, had in mind the much vexed question as to whether the bridge was a part of the Union Pacific Railroad and was thus amenable to the provisions of the Pacific Railroad Acts of 1862 and 1864, is this. Congress was very careful to incorporate into the Act of 1871 the following provision:

> "And provided, That nothing in this Act shall be so construed as to *change the eastern terminus* of the Union Pacific Railroad from the place where it is now fixed under existing laws nor to *release said Union Pacific Railroad Company, or its successors, from its obligations as established by existing laws.*"

Congress must necessarily have had under consideration at that time this question, which was afterwards so vigorously fought through the courts to the Supreme Court of the United States, and where one member held

that the bridge was not a part of the Union Pacific Railroad. If it had not considered this question, it would never have put into the Act the provisions above quoted. It was to guard against that contingency and that claim that those provisions were put in, and even as against those direct provisions, as above stated, one member of the Supreme Court held that the bridge was not built under the provisions of the Pacific Railroad Acts of 1862 and 1864, but under authority of the Act of 1871, and that it was not a part of the Union Pacific Railroad. Nothing could show more plainly that Congress had the question referred to under consideration, and that it was for the sake of abundant precaution and to guard and protect the interests of the United States Government in the use of the bridge that the reference was made to the Act of 1866.

Such a burden as complainant claims Congress intended to place upon this bridge by the Act of 1871, in effect wresting the control of its bridge from the Union Pacific and making it subject to the use of all other railroads, is hardly to be placed thereon by vague inference and conjecture. If Congress intended to place such a burden on the bridge and to that extent greatly depreciate its earning capacity, a few plain and unambiguous words would have been sufficient to accomplish its purpose.

Suppose in the Act of 1866 some of the bridges were specifically made open to the use of railroad companies, as they were, but that as to the others, as, for instance, the St. Louis bridge, it was specifically declared that they were not so limited, instead of, as was done,

not limiting them by making no reference to the limitation either way. Could it then be claimed that a reference in general terms to the provisions of that Act was intended to refer to the clause limiting the use of the bridge to all railroads rather than the clause specifically stating that it was not so limited? We think that under no correct rule of construction could this be held. We cannot see that a different rule of construction could apply where some of the bridges were so limited by direct words and the others were not limited by omitting all words of limitation.

The opinion in the case of *Union Pacific Ry. Co. vs. C., R. I. & P. Ry. Co., supra*, says (p. 586):

> "The original charter of 1862 required the construction of the Pacific road from the east bank of the river, and so impliedly authorized the company to bridge it, and the amendatory Act of 1864 expressly gave the corporation authority 'to construct bridges over said Missouri River.' The bridge contemplated was for the company's use as a part of its road, *and no provision was made for other roads or other business*, nor were any special means provided for the construction of the bridge."

The object of the Act of 1871 was not to restrict the powers of the Union Pacific Company, but to give it additional powers. The opinion would read into that Act a contraction of its powers, rather than an extension thereof, for it says distinctly, as quoted above, that in the original grant to the company of its authority to build the bridge, "no provision was made for other roads or other business." We cannot believe this was the intention of Congress.

However, this language, which we have been discussing does not construe the Act of 1871 as imposing this duty on the Pacific Company, but rather uses it in aid of the argument that the language being such as it is in the Act, it would be an additional reason for holding that the power existed in the Union Pacific Company to make a contract allowing another road to use its bridge. It is, however, an entirely different construction from the one intended by the Court in the Rock Island case, that the appellee is attempting to read into the case at bar. If the majority of the Court meant what the appellee claims it meant, then the dissenting opinion of Justices SHIRAS and GRAY would be absolutely without foundation and their argument without weight.

The opinion seems to emphasize the phrase in the Bridge Mortgage Act of 1871, "for the more perfect connection of any railroads, etc.," saying "the common object of both these Acts plainly was the more perfect connection of roads running to the bridges on either side of the river." It also quotes from the Act approved June 15, 1866, in which authority is given to railroads "to connect with roads of other states so as to form continuous lines." It then states (p. 589):

> "It is impossible for us to ignore the great policy in favor of continuous lines thus declared by Congress, and that it is in effectuation of that policy that such business arrangements as will make such connections effective are made."

We may grant all this, and admit that Congress desired to make "more perfect connections" between

railroads so as to form "continuous lines" for convenience in transportation, but we cannot admit, in order to make more perfect connections between railroads so as to form continuous lines, that necessarily any railroad must have the power to run its trains and engines over the tracks and bridges of any other. If one railroad makes a physical connection with another by both lines running into the one depot, that makes a continuous line within the meaning of the Act of Congress above referred to. It does not necessarily follow that the first road must have the use of the second road's tracks. If the roads wish, they can, as it is usually done, make an amicable arrangement by which freight in carload lots may be delivered to the connecting carrier and by it carried along on its journey without the necessity of transferring to the second company's freight cars. In the same way sleeping cars are run on different roads clear across the continent. That is what is meant by Congress by the use of the term "continuous line" and also "more perfect connection." So in the case of a bridge. It certainly makes a better connection to use a bridge than a ferry boat, and that is what is meant by the language of the Act of 1871. It cannot be distorted into meaning that "more perfect connection" could not be had without the joint use of the bridge by all railroads desiring to use it. In the opinion in the Rock Island case at p. 588 a quotation is made from the opinion of Justice STRONG, in the case of *Union Pacific R. Co. vs. Hall*, 91 U. S., 343, 346, as follows:

> "From it may reasonably be inferred that the purpose of Congress was to provide for connections

of the branches of the main line of the Union Pacific road with railroads running through the states on the east of the territory, and to provide for those connections *within those States, at points at or near their western boundaries.*"

This language is quoted as supporting the conclusion that Congress intended that railroads running through the states on the east of the Territory (Nebraska), should have the right to cross the Union Pacific bridge, and thus make a virtual connection with the Union Pacific at Omaha, Nebraska. But we think the language of Justice STRONG quoted means just the opposite. He says distinctly that it was the purpose of Congress to provide for connections with the branches of the Union Pacific "within those states at points at or near their *western boundaries*". That is, in case of a railroad running through the State of Iowa, to affect a connection with the Union Pacific, such connection would be had at a point, at or near the *western boundary* of the *State of Iowa.* The fair effect of Justice STRONG'S language is that it was the intention of Congress, in passing the Pacific Railroad Acts, that roads from the east should connect with the Union Pacific at Council Bluffs, the point nearest the western boundary of the State of Iowa. There is certainly nothing in it indicating that Congress intended the Union Pacific bridge should be open to the use of other railroads.

We insist that the phrase in the Act of 1871,

"for the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed, and limited by

> the provisions of the act entitled 'An Act to authorize the construction of certain bridges, and to establish them as post roads', approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto",

refers only to such general provisions as cover all the bridges referred to in the Act of 1866, and not to specific clauses, which apply only to the specific bridge which is referred to in the different sections. For instance, Section 1 refers to the bridge across the Mississippi River at Quincy, Illinois. There is a special provision in that section requiring that when that bridge is constructed "all trains of all roads terminating at said river, at or opposite said point, shall be allowed to use said bridge for reasonable compensation to be made to the owners of said bridge." Now, if this specific provision does not refer to this bridge alone, then we must construe into the Act of 1871 the whole provision, and under that provision only, such railroads would be allowed to use the Pacific Company's bridge as terminate at the Mississippi River, at or opposite Quincy, Illinois, for it certainly cannot be contended in argument that specific words can be picked out and applied to the Pacific bridge and that other words in the same sentence can be thrown aside and disregarded.

So we believe that a restriction which would compel the owners of the bridge at Quincy, Illinois, to allow railroads terminating at Quincy to cross the same, would not be applicable to a bridge across the Missouri River at a point hundreds of miles away from the terminus of the roads referred to in the Quincy section.

The fact is, that in endeavoring to extend to the Union Pacific Company additional powers to assist it in floating its bridge bonds, the legislators were attempting to bring to its aid every provision which had been passed which might be of value to it, and therefore referred back to the Act of 1866 and incorporated in the Act of 1871, by that reference all provisions which would be of benefit to the Union Pacific Company, and also provisions which would be beneficial to the government in the matter of carrying mails and troops. But now appellee wishes to take advantage of that situation and read into the Act a construction which would make the reference unfavorable to the best interest of the company, rather than favorable, and take away from the Union Pacific Company all power to control its bridge and make its own contracts with reference to the crossing of the same.

The mere fact that the Pacific Company had the right to say to any railroad company that it could not make use of the Pacific Company's bridge unless it was willing to accept whatever terms said Pacific Company might dictate, would render the Union Pacific bridge, and property as valuable as was the St. Louis bridge, referred to in Sections 11 and 12 of the Act of 1866, which was not burdened with the conditions of use by any railroad, and by reason thereof, the owners of that bridge were able to arrange favorable terms with all roads desiring to enter the City of St. Louis over that bridge.

The intention of the Government in aiding the building of the Pacific Railroad was not, as complainant would have us understand, for the purpose of having

the country traversed by a network of railroads, but for the purpose of establishing a highway between the Missouri River and the Pacific Coast. This was a great undertaking and the idea of other roads going through was probably never in the contemplation of the legislators at the time of the passing of the Pacific enabling acts, for if such an idea had been present, no such inducements would have been offered to the company to put it through and build it.

Referring again to the case of *Union Pacific R. R. Co. vs. Hall*, 91 U. S. 343, we quote as follows from the opinion (pp. 352, 353):

> "It is a railroad bridge, a continuation of the line west of the river; and it connects the road with its required eastern terminus. * * *
>
> "To hold that the bridge is not a part of the road would defeat the plain object Congress had in view in 1862 and 1864,—a continuous line for *connection with the Iowa roads.* It would be allowing the *connection to be made in Nebraska*, instead of on the *western boundary of Iowa*, when the Act of 1871 expressly declared that nothing therein should be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it was then fixed by existing laws."

We think that this language plainly shows that it was the opinion of Justice Strong at least that the "more perfect connection" of the Iowa roads was intended by Congress to be on the Iowa side of the river, and that Congress had no idea, by the use of that phrase in the Act of 1871, that the Iowa road should be allowed to use the bridge and cross over to Nebraska and there

make connections with the Union Pacific, and that a "more perfect connection" by no means meant the use of the bridge by the Iowa roads.

Here was a road with its eastern terminus established by law at Council Bluffs, connecting with Iowa railways there, with a bridge across the river started, but without funds to complete the building of the same. Connections were made with these roads by the Pacific Company in winter over the ice and in summer on ferry boats. When a bill was passed to secure funds to complete this bridge it was natural for the preamble to recite:

> "For the more perfect connection of any railroads that are or shall be constructed to the Missouri river;" [no more ice bridges or ferry boats, but a perfect connection by means of a bridge.]

This brings us to a consideration of the Act of 1871.

The Act of 1871.

The Act of February 24th, 1871, was the bridge bonding act. It was not passed for the purpose of granting to the Union Pacific Railroad Company authority to construct a bridge across the Missouri River, but simply and solely for the purpose of enabling the company to raise funds wherewith to build the bridge. The authority to build the bridge had theretofore been granted to the Union Pacific Railroad Company by the Acts of July 1st, 1862, and July 2d, 1864.

Referring to the original charter of the company, the Act of July 1, 1862 (12 Stat., 489), and the various acts amendatory thereto, it will be found, by Section 14

of said act, that the Union Pacific Railroad Company was authorized and required to construct a line of railroad and telegraph from a point on the western boundary of the State of Iowa westward. In the act of July 2, 1864 (13 Stat., 356), in Section 9 thereof, there is given special authority to the Union Pacific Railroad Company to construct its bridge over the Missouri River, as well as any other rivers necessary in the construction of its road; said Section 9 is as follows:

> "Sec. 9. *And be it further enacted*, that to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri River and all other rivers for the convenience of said road."

The charter of the Union Pacific Railroad Company expressly required the company to operate its whole line of railroad, including the bridge, as one continuous line. Section 12 of Act of July 1, 1862 (12 Stat., 489), provides:

> "The whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one connected, continuous line."

Also Section 15 of the Act of July 2, 1864 (13 Stat., 356), provides:

"*And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one continuous line."

It has been distinctly held by the Court that the authority to build the bridge across the Missouri River was expressly conferred by said Acts.

"It was commenced in 1869 under the acts of 1862 and 1864. These acts were the only authority the company had at the time of its commencement for building it. It is a railroad bridge, a continuation of the line west of the river; and it connects the road with its required eastern terminus. The acts chartering the company manifest no intention to distinguish between the bridge over the Missouri River and other bridges on the line of their road. If it is not a part of their road, neither is any bridge between the Missouri River and the western boundary of Nevada; for the power to build all bridges was given in the same words."

Union Pacific R. R. Co. vs. Hall, 91 U. S., 352.

"The Omaha bridge of the Union Pacific Railway Company was not constructed under the act of 1866. It was constructed under the original acts incorporating the company—the acts of July 1, 1862, and of July 2, 1864, and the act of February 24, 1871; and the reference in the last named act to the act of 1866, was for the purpose of extending the provisions of the latter, so far as

necessary to confer additional powers upon the railway company for the use and protection of the bridge."

Union Pacific Ry. Co. vs. United States, 117 U. S., 355, 361.

It is thus clearly established that the authority to build the bridge across the Missouri River was conferred by the acts of 1862 and 1864. The construction of the bridge had been commenced in 1869. The company was in financial difficulty and unable to complete the same, and appealed to Congress for legislation to aid it in securing the necessary funds.

General Dodge testified that the company, being without funds to build the bridge, requested him to go to Washington with others, which he did, and he secured the passage of the Act of 1871. It was not the intention of Congress to put any burdens upon this bridge of any kind or character. It intended to make the measure as attractive as possible and to do everything in its power to aid the company in the sale of these bonds, from the proceeds of which it could construct the bridge. The act was a binding act for the purpose of raising money to complete a bridge already authorized by Congress and not a law giving the railroad the right to build a bridge upon certain terms and conditions.

In the preamble occurs the following:

"That for the more perfect connection of any railroads that are or shall be constructed to the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska the Union Pacific Railroad Company, be and it is hereby, authorized to issue such bonds," etc.

The only legitimate construction that can be given to this language, taking into consideration the fact that this act was passed for the purpose of financing the bridge and raising money, would be that all roads constructed to the Missouri River, at or near Council Bluffs, Iowa, would transfer their freight and passengers to the Union Pacific Railroad Company at said point, and that the Union Pacific would haul the same across the river; that all railroads that should be constructed to the Missouri River at or near Omaha, Nebraska, would turn over their freight and passengers to the Union Pacific at Omaha, and the Union Pacific would transfer the said freight and passengers across the bridge and deliver them to the connecting lines at Council Bluffs. This would make a paying division of that part of the road, and investors would see that the earning capacity of the bridge would be such that the bonds issued would be valuable property, and that therefore a market would easily be found for their sale.

Again, the Supreme Court of the United States has so construed this measure, for in the Hall case, *supra*, it says:

> "There is nothing either in the act of 1862 or 1864, or in that of February 24, 1871, which empowers them to build more than one bridge over the Missouri for the Iowa branch; and the latter act contains an implied recognition of their right under the former acts to build their bridge on its present location. There is no intimation in it of a distinct bridge franchise. It grants no power to build a bridge. *Its main purpose* manifestly was to give the company *additional means* and privileges

for the *completion of a structure already authorized*, not to enable them to construct a new and independent road."

Union Pacific R. R. Co. vs. Hall, 91 U. S., 343, 353.

Having thus clearly established, first, that the authority to build the bridge was conferred by the Acts of 1862 and 1864, and, second, that the Act of 1871 was simply a financial measure, let us now analyze the Act of 1871 and ascertain exactly what was authorized in express terms by said act, and what conditions, if any, were imposed either by express terms or by reference or implication.

(*a*) In that act authority is given the Union Pacific to issue bonds and secure the same by mortgage on the bridge, approaches and appurtenances.

(*b*) The bridge is to be so constructed as to provide for the passage of vehicles.

(*c*) The company is authorized to levy and collect tolls and charges.

(*d*) "For the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the act entitled 'An Act to authorize the construction of certain bridges and to establish them as post roads,' approved July 5, 1866, so far as the same is applicable thereto."

(*e*) That nothing in the act shall be construed to change the eastern terminus of the Union Pacific from the place where it is now fixed under existing laws, nor

to release the Union Pacific from its obligations as established by existing laws.

(*f*) Congress has the power to regulate said bridge as to rates for transportation of freights and passengers.

(*g*) The amount of the bond issue shall not exceed two and a half million dollars.

(*h*) If constructed as a drawbridge, the same shall be constructed with spans not less than 200 feet in length in the clear, etc.

There is no command that the bridge when constructed and in operation shall be open to the use of other railroads.

It is appellee's contention (1) that by the language in the preamble "for the more perfect connection of any railroads" Congress intended that the bridge should be open to the use of other railroads, and (2) that by the terms of the Act of 1866, to which reference is made in the Act of 1871, it was the duty of the Union Pacific to permit other railroads to cross the bridge and use the terminal facilities.

The first contention that, by the use of the words "for the more perfect connection of any railroads" Congress intended that the bridge should be open to the use of any railroad desiring to use the same, is wholly unreasonable and would take from these words their ordinary and proper meaning and significance.

Prior to the construction of the bridge the means of crossing the river was by ferry in the summer and by ice bridges in the winter. It was necessary to have a "more perfect connection" than by these rude methods. A bridge would make a "more perfect connection" and

would aid the Union Pacific in making a more perfect connection with the road terminating on the eastern bank of the Missouri. Congress had not in contemplation the aiding of other roads and did not confer this power to borrow money on the Union Pacific in order that other roads should have the use of the bridge to make a better connection with the Union Pacific. Counsel might just as well claim that under this language any road could have forced the Union Pacific to take its trains across on the ferry and ice bridges. Of course, if a bridge was built, the connection would be better, and it would be more convenient for all parties concerned.

After Congress had specially provided for an eastern terminus of the Union Pacific and provided the road should be run as one continuous line, and thus saying where the connection with the roads from the east should be made, it could hardly be said that the mere use of the words "for the more perfect connection" would indicate the intention of Congress that the actual connecting point should be somewhere else across the river.

The use of the words "for the more perfect connection of any railroad" was for the benefit of the Union Pacific. Congress was doing all in its power to make the Act attractive and aid the company to dispose of its bonds.

The "more perfect connection" was to be made, not on the western bank of the river, but on the western boundary of the State of Iowa, at the terminus fixed by the laws of Congress and the acts of the Executive thereunder.

In fact, Congress, for fear that the Union Pacific or its successors might take advantage of the language used and place thereon a strained construction such as is sought here, incorporated in the act the following:

> "*And provided*, That nothing in this Act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company, or its successors, from its obligations as established by existing laws."

It is not necessary to constitute "perfect" or "more perfect" connection between two railroads that each must have the use of the other's tracks at the connecting point, nor as is claimed in this case, is it necessary to constitute a "perfect" or "more perfect" connection that the appellee should have the use of the bridge and tracks thereon. All that Congress meant was that instead of making connections with eastern lines by means of ferries or ice bridges across the Missouri river, the connection when accomplished by means of a bridge would be better and more convenient for all parties.

This language in the act would draw attention to the value of the bridge. Again, provision is made in the Act of 1871 for the use of the bridge as a wagon and foot bridge, and authority is given the Union Pacific to charge tolls for the same. This authority was not granted it by the Acts of 1862 and 1864, and this provision was put in, in order to make the bridge more valuable and to aid in the sale of the bonds.

There never was any thought or intention upon the part of Congress to restrict or hamper the Union Pacific in any way.

That the connection with other roads should be on the Iowa side was clearly the purpose of Congress, and it has been so construed by this Court, which said:

> "To hold that the bridge is not a part of the road would defeat the plain object Congress had in view in 1862 and 1864—a continuous line for connection with the Iowa roads. It *would be allowing the connection to be made in Nebraska instead of on the western boundary of Iowa*, when the Act of 1871 expressly declared that nothing therein should be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it was then fixed by existing laws. Indeed, that proviso was quite unnecessary if the bridge was not thought to be a part of the railroad connecting the other part with the western boundary of Iowa."
>
> *Union Pacific R. R. Co. vs. Hall*, 91 U. S., 343, 353.

Again, we think that this question is absolutely settled by the Supreme Court in the Hall case, *supra*, for it says on page 350:

> "It is well to observe here that the authority was given to the company as a railroad company, and not as a bridge company. *The bridge was for the convenience of their road, and to enable them to connect it with other roads. They could build it for no other uses. They were not authorized to use it for other purposes than those of their road.* They were not allowed to charge rates of toll which they did

not charge upon other portions of their line. If they acquired such a right, it was by subsequent legislation—by the Act of 1871, to which we shall refer hereafter; but if, under the acts of 1862 and 1864, the company were authorized to build a railroad bridge across the river, and if such bridge was a part of their road, and not another railroad, the conclusion is irresistible that their road was intended to have its eastern terminus on the Iowa shore of the river."

Union Pacific R. R. Co. vs. Hall, 91 U. S., 343, 350.

We think that this is absolutely decisive of this question. Here is a construction of the Acts under which authority to build the bridge was given, that is, the Acts of 1862 and 1864, holding that the bridge was built for the convenience of the Union Pacific Railroad; that it could not be built for any other purpose, and that the company was not authorized to use it for any purpose other than that of the road itself. We therefore think there is nothing whatever in the contention of appellee that it is entitled to use this bridge because the words "for the more perfection connection of any railroads" are found in the preamble of the Act of 1871.

Act of 1866.

It is next claimed by appellee that the Act of 1871 refers to the Act of 1866, and that under the Act of 1866 authority is given, or in the words of the appellee, it is the duty of the Union Pacific to permit appellee to cross the bridge and use the terminal facilities referred

to. The reference to the Act of 1866 in the Act of 1871 is in the following language:

> "*And for the use and protection of* said bridge and property, the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the Act entitled 'An Act to authorize the construction of certain bridges and to establish them as post roads,' approved July twenty-five, eighteen hundred and sixty-six, *so far as the same is applicable thereto.*"

It will be necessary, therefore, for us to examine the Act of 1866. We find it is a comprehensive act granting to various companies the right to construct various bridges, and shows that in each instance where it is intended that the use of the bridge shall be open to any railroad company desiring to cross the same, this limitation is incorporated as a special provision with reference to that particular bridge, and there is no general provision in the Act making this proviso with reference to all the bridges named therein.

An analysis of said Act shows the following:

In Section 1 authority is granted to construct a bridge across the Mississippi at Quincy, and provision is made for the use of said bridge by all railroads desiring to do so. Provision is also made for the trial of cases involving obstructions to navigation in the United States Court.

In Section 2 there is a general provision covering all bridges authorized by the Act, that said bridges might be constructed as draw bridges or with continuous spans, and regulating the height, size, etc., in each case. It is provided, further, in connection with the *use* of the draw

bridges, that the draw should be opened promptly to admit the passage of boats, except when trains are passing over same, and that no unnecessary delay shall occur after the trains have passed over.

In Section 3 there is another general provision also covering *all* bridges authorized by the Act, providing that all said bridges shall be lawful structures and *post routes*, also providing for rates of toll for the United States Government over same.

In Section 4 authority is given the Burlington road to construct a bridge across the Mississippi "upon the same terms, in the same manner, under the same restrictions, and with the same privileges" as in relation to the Quincy bridge.

In Section 5 authority is given to construct a bridge across the Mississippi at Hannibal "on the same terms and subject to the same restrictions" as in relation to the Quincy bridge.

In Section 6 authority is given to construct a bridge across the Mississippi at Prarie du Chien "on the same terms and subject to the same restrictions" as in relation to the Quincy bridge.

In Section 7 authority is given to construct a bridge over the Mississippi at Keokuk, and it is provided that "the said bridge, in its use and operation, shall be subject to the same restrictions" as in relation to the Burlington and Quincy bridges.

In Section 8 authority is given to construct a bridge across the Mississippi River at Winona, "subject to all the terms, restrictions and requirements contained in the foregoing sections of this Act."

In Section 9 authority is given to construct a bridge across the Missouri at Dubuque, "with the same privileges, upon the same terms and under the same restrictions," as in relation to the Quincy bridge.

In Section 10 authority is given to construct a bridge across the Mississippi River at Kansas City, "upon the same terms and conditions provided for in this Act."

In Section 11 authority is given to construct a bridge across the Mississippi at St. Louis. There is no provision in this section for the use of the bridge by any railroads constructed to the Mississippi River at that point.

In Section 12 provision is made that the St. Louis bridge, last named, shall be built with continuous spans, and height, etc., of spans provided for.

In Section 13 the power is reserved to amend the Act to prevent material obstructions to navigation by the bridges.

Hence it will be seen that Congress started out first with the Quincy bridge, and made the *special* provision as to it that it might be used by all railroads desiring to do so, and also that litigation involving obstruction to navigation might be tried in the federal court.

The next step was the incorporating in the Act of two general omnibus sections, numbers 2 and 3, covering all bridges named in the Act. The first provision is as to the *construction* of the bridges, namely, that they might be built as draw bridges or with continuous spans, and providing details as to construction. The next provision is as to the *use* of all bridges when constructed as draw bridges, namely, that they must be promptly

opened for passage of vessels as required. In Section 3 there is still another general provision as to the *use* of all the bridges, namely, that they should be post routes. For the *protection* of the bridges it is provided they shall be lawful structures. Then a provision is made for rates of toll to be charged the United States Government.

After making the general provisions contained in Sections 2 and 3 with reference to *all* bridges mentioned in the Act, Congress came back to the question of individual bridges. Of course all the general provisions named in said Sections 2 and 3 would apply, but the question would then naturally come up, as each new bridge was provided for, as to how far the special restrictions named in Section 1 with reference to the Quincy bridge should be applied, that is, whether the bridge should be open for use by any railroad company and whether litigation touching obstructions should be tried in the United States Courts. Section 4 specifically declares that said provisions should apply to the bridge at Burlington. Section 5 that they should apply to the bridge at Hannibal; Section 6 to the bridge at Prarie du Chien; Section 7 to the bridge at Keokuk; Section 8 to the bridge at Winona; Section 9 to the bridge at Dubuque; Section 10 to the bridge at Kansas City.

Section 11 provides for the construction of a bridge at St. Louis, and there are no restrictions or limitations whatever so far as the use of the bridge by railroads is concerned. There is no reference to the section authorizing the use of the Quincy bridge or such language as that it shall be built subject to the restrictions

or limitations found in this Act. There are no limitations except those that are referred to in the section itself and the section following, that is, Section 12.

We find, therefore, that in the Act of 1866 there are thirteen sections, ten of which are special and three general. The general sections are Sections 2, 3 and 13.

Section 2 relates to draw bridges, size, etc., and the *use* of the draw bridges, to be opened promptly when necessary.

Section 3 declares that all bridges shall be *lawful structures* and *post routes*. Note here the great importance Congress attached to declaring these bridges "post routes," so much so that it incorporated this provision in the title: "An Act to authorize the construction of certain bridges, *and to establish them as post roads*." Out of the many various provisions in this long Act, this was the only one that Congress deemed it essential to make a part of the title. We think this is very significant as showing the importance Congress attached to making these bridges "post routes" and that it has a direct bearing on the thought in mind in making this reference to the Act of 1866 in the Act of 1871.

We find in an amendment to the Act of 1866, in reference to the St. Louis bridge, approved July 20, 1868 (15 Stats., 123), that a special clause was inserted declaring said St. Louis bridge to be a "post road," although all the bridges included in the Act of 1866 were declared such in Section 3 thereof.

Section 13 relates to the reservation of the power of Congress to alter or amend the Act so as to prevent or remove obstructions to navigation.

We earnestly contend that when Congress used the words "as far as the same is applicable thereto" the reference was to the sections which were general in their character and not those which were special. Under any rule governing the construction of statutes that we know of, the reference would be to the general and not the special sections.

It would be just as sensible and reasonable for appellant to contend that the only section applicable is Section 11, which authorized the building of the bridge at St. Louis without the duty of permitting railroads to use it, as it is for appellee to contend that it is the other sections in the act wherein it is made the duty of the respective companies to permit railroads to cross. Here is an Act authorizing the construction of certain bridges, a number of which bridges are to be open to railroad companies, and others are not, and in the Act there are certain general provisions applicable to *all* the bridges mentioned. In a subsequent Act reference is made to the provisions of the former Act. There is no rule of law or construction that can be cited that would hold that the reference in the latter Act was to the special provisions of the former, thus referring only to some of the bridges named, and not to the general provisions applicable to all the bridges.

Counsel for the appellee, in their argument to the Circuit Court of Appeals, claimed that the restrictions as to use by railroads generally applied to the St. Louis bridge, because the Act of Congress authorizing said bridge (Section 11) required it to be "subject to all the conditions contained in said act of incorporation and

amendments thereto," and not having fully investigated the act of incorporation and amendments referred to (Missouri Acts, Feb. 5, 1864, and Feb. 20, 1865), they fell into the error of arguing that those acts imposed the restrictions in question. As a matter of fact they did not, as an examination thereof will clearly show, neither did the bridge become subject to such use by the provisions of any of the acts of Missouri or Illinois, under which it was erected.

For convenience we here quote again said Section 11:

> "SEC. 11. *And be it further enacted*, That the Saint Louis and Illinois Bridge Company, *a corporation organized under an act of the general assembly of the State of Missouri*, approved February fifth, eighteen hundred and sixty-four, and an act amendatory of the same, approved February twentieth, eighteen hundred and sixty-five, and also *confirmed* in its corporate powers under an act of the legislature of the State of Illinois, approved eighteen hundred and sixty-four, *or any other bridge company organized under the laws of Missouri and Illinois*, be and the same is hereby empowered to erect, maintain and operate a bridge across the Mississippi River, between the City of St. Louis in the State of Missouri, and the City of East St. Louis in the State of Illinois, subject to all the conditions contained in *said act of incorporation and amendments thereto*, and not inconsistent with the following terms and provisions contained in this act. And in case of any litigation arising from any obstruction or alleged obstructions to the free navigation of said waters, the

cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches."

FIRST. It will be noted that said Section 11 does not make the bridge subject to the conditions contained in the *confirmatory* act of the Legislature of Illinois, approved February 16, 1865. It is only subject to the provisions contained in the *act of incorporation* of the Legislature of Missouri of February 5, 1864, and the amendment of February 20, 1865. It is only subject to "the conditions contained in said act (not acts) of incorporation and amendments thereto," and no reference is made to the act of the Legislature of Illinois approved February 16th, under which said corporation was "*confirmed* in its corporate powers." Hence it is manifest that to determine the conditions in question reference should be had only to the Missouri act of February 5, 1864, and the amendment thereto of February 20, 1865. An examination of these acts as set out below will show that there is no restriction as to use therein, and therefore no such restriction is put upon the bridge by Section 11 of the Act of Congress above quoted.

SECOND. We now come to the question of whether, irrespective of the Act of Congress in question, the St. Louis bridge is subject to use by railroads generally. The bridge in question was not built under the provisions of the Acts of the Legislatures of Missouri and Illinois above referred to. In the Act of Congress of 1866 permission to erect the bridge is granted to the corporation therein named, the "St. Louis and Illinois Bridge Company," organized under the two Acts of the

Legislature of Missouri and confirmed in its corporate powers under the Act of the Legislature of Illinois, or to "*any other bridge company organized under the laws of Missouri and Illinois.*" It will be shown below that the bridge was constructed by a bridge company receiving authority therefor from Acts of the Legislatures of Missouri and Illinois subsequently passed.

On the 5th day of February, 1864, there was passed the incorporation act of the State of Missouri, and February 20, 1865, an act amendatory of the same, which will be found set out in full on pages 300–308 in the Appendix to the Brief of Appellee.

On March 19, 1868, there was passed by the Missouri Legislature a consolidation act, which is set out in full at page 320 of the Appendix to Brief of Appellee.

On February 21, 1867, there was passed the Illinois Act referred to in the preceding Consolidation Act, which is set out at pages 314 to 319 of Appendix to Brief of Appellee.

Under the Consolidation Act referred to the St. Louis bridge was built, and the company was called the Illinois & St. Louis Bridge Company, as provided by Section 1 of said Act. An examination of these different acts of incorporation in the states of Missouri aud Illinois will show that there was no provision in any of them *requiring* the Bridge Company to allow any railroad companies to cross this bridge.

The Illinois and St. Louis Bridge Company has the absolute and unqualified right to control the bridge without any reservations whatever.

The point which we desire to impress upon the Court

is that nothing was done and no corporation formed under the Illinois Act referred to in Section 11 of the Act of 1866. Such act contained a clause from which the inference might perhaps be drawn that railroads were to have the right to use the bridge. Nothing, however, was done under this act and the Illinois corporation which was subsequently consolidated with the Missouri corporation was organized under an entirely distinct act, viz., Act of February 21, 1867, which contained no such clause. Neither the act of Missouri, under which the Missouri corporation was organized, nor the act of Illinois, under which the Illinois Bridge Company was created, nor the Missouri act consolidating the two corporations, contained any clause whatever requiring the bridge companies to permit railroads constructed thereto to use the bridge.

So that it will be seen from an examination of these acts that counsel for appellee are entirely wrong when they attempt to show that there was any requirement on the part of Congress compelling the Illinois & St. Louis Bridge Company to allow railroads to use that bridge. This bridge was built and is the celebrated Eads bridge, and the fact is absolute and incontrovertible that from the date of its completion to the present day it has been owned and operated exclusively by this company and no railroad has ever used the bridge or received any right to cross or ever had any right to cross. All trains of roads coming into East St. Louis are taken by the company operating this bridge with its own engines, own crews, under its own terms and own arrangements.

Again Section 11 of the Act of 1866, provides that

the St. Louis and Illinois Bridge Company, a corporation organized under the acts of the State of Missouri, shall be empowered to erect a bridge, etc. The only reference to an Act of the Legislature of the State of Illinois found in this section 11 is that the powers of the Missouri corporation shall be "confirmed," etc. So it is to the Missouri corporation that we look for authority, and the terms under which the bridge shall be built, because the Illinois act is only confirmatory.

So that it is clearly seen that it must have been the deliberate intention of Congress to exempt the St. Louis bridge from the burdens imposed upon the other bridges in the same act.

Other Congressional Acts.

For the purpose of showing that Congress did not intend to permit other railroads to use the bridge in question, and that no such meaning as is contended for by appellee is to be given to the Act of 1871, we desire to call the Court's attention to other Congressional railroad bridge acts. We have made a careful examination of many of the acts of Congress authorizing the construction of railroad bridges, beginning with the 17th United States Statutes at Large.

In each and every instance when Congress intended that other roads should be allowed to use the bridge authorized to be constructed, *it imposed this condition in clear, distinct and unambiguous terms.*

Scattered all through the statutes are these acts, several hundred in number; many of them authorizing

and directing the use of the bridge by other railroads, and many not placing this burden on the bridge.

There are a number of railroad bridge acts passed by this same Congress that passed the Act of February 24, 1871, the Congress of 1870–1871, namely:

(1) The Act approved June 30, 1870, authorizing the construction of a bridge across the Niagara River, in which act Congress, speaking in no indefinite way, states that all railway companies desiring to use this bridge shall have and be entitled to equal rights and privileges, etc.

(2) The Act approved July 1, 1870, authorizing the construction of a bridge across the Arkansas River, in which is granted express authority to other railroads to use the bridge.

(3) Two Acts approved March 3, 1871, *just exactly one week after* the approval of the Bridge Bonding Act of February 24, 1871; one of these acts authorizing the construction of a bridge across the Mississippi, and the other across the Wabash. In both of these instances we find that Congress spoke clearly and explicitly, and declared that these bridges should be subject to use by other railroad companies.

We find, therefore, that when Congress desired to impose this burden, it did so in plain, specific and unequivocal language, without ambiguity or indefinite reference to any other act.

Here are three acts passed in the same week, all under discussion at the same time, the provisions of each thoroughly considered. and in two of the acts Congress

authorized the use of the bridge to be constructed by other railroads, and in one it did not. We submit that the difference in the language cannot be ascribed to blind chance or the mere haphazard use of words. The different expressions used are pregnant with meaning.

Congress determined the necessity for the use of the bridge by other roads or not in each case. For instance, in the Act approved December 17, 1872 (17 Stats., 398) in which a bridge is authorized to be constructed across the Ohio River, above the mouth of the Big Sandy, there is no provision for its use by other railroads.

In the same way, in the Act approved March 3, 1873 (17 Stats., 610), authorizing construction of a bridge across the Genesee River, there is no provision for other roads to use it.

Act approved June 23, 1874 (18 Stats., 274), bridge across the Potomac River. No authority for use by other roads.

Act approved June 23, 1874 (18 Stats., 281), bridge across the Willamette River at Portland. No authority for use by other roads.

Act approved December 23, 1880 (21 Stats., 313), bridge across the St. Mary's River in Georgia. No authority for use by other roads.

Act approved August 8, 1882 (22 Stats., 370), bridge over the St. Croix River. No authority for use by other roads.

Act approved May 29, 1884 (23 Stats., 30), bridge across the Rio Grande River at Laredo, Texas. No authority for use by other roads.

Act approved July 5, 1884 (23 Stats., 104), bridge across the Mississippi River at St. Paul. No authority for use by other roads.

Act approved February 25, 1885 (23 Stats., 309), bridge across the St. Croix River, at Stillwater, Minn. No authority for use by other roads.

Act approved June 24, 1884 (23 Stats., 52), bridge across the Willamette River near Salem, Oregon. No authority for use by other roads.

Act approved April 28, 1884 (23 Stats., 14), bridge across the St. Croix River between Wisconsin and Minnesota. No authority for use by other roads.

Without proceeding further in detail, we may state that we have examined the 24th, 25th, 26th, and 27th United States Statutes, for the years 1886–1893, and in these we find twenty-eight different railroad bridge Acts authorizing the construction of railroad bridges across the rivers of the United States, without any provision that they should be used by other railroads.

We confidently submit, therefore, that these acts show conclusively and indisputably that Congress, when it intended that the bridge authorized to be constructed should be open to the use of all railroads desiring it, so stated in no uncertain terms. What other reason can be assigned for the constant repetition and reiteration of the declaration that these bridges should be used by all other railroads in many of these acts and entire absence of the same declaration in many others? We think that there can be no other answer than the one that we have before given. We do not believe a case can be found in which the intention of Congress could be more clearly shown

than is established by an examination of these different bridge acts.

Counsel for appellee have referred to the language of Judge SANBORN in delivering the opinion of this Court in the *Rock Island case*, 51 Fed. Rep., 309, wherein Judge SANBORN refers to the fact that in almost all of the large number of statutes authorizing the construction of bridges by Congress a provision is incorporated granting the right to other companies to use the same.

This is true, and is it not significant that Congress always in express terms gave this authority and imposed this burden and almost always in the same language?

On the other hand, we have shown that in a large number of such statutes no such authority is given and no such burden is imposed. This clearly establishes the intention of Congress to relieve, for good and sufficient reasons, certain bridges from the imposition of this burden.

How strikingly significant is all this when we consider the Act of 1866 itself! Right in this very act there were eight bridges authorized to be constructed across the Mississippi and Missouri Rivers, on seven of which this burden was imposed, and on one of which (the Great Eads Bridge at St. Louis) it was not.

Again, it is important to notice that no such language was used in the Act of 1871. The other side contend that it is found in almost all similar statutes. Certainly that is true. Then why not put it in the Act of 1871? No, Congress intended, for the reasons we have shown, that these connecting lines should not cross the bridge, but that the connection should be made upon the Iowa

side of the river, and thus nothing done to contravene or interfere with the settled determination of Congress that the eastern terminus of the Union Pacific should be on the Iowa side.

To show that this omission was not an oversight, but was the deliberate act of Congress, we would call the Court's attention to the following facts:

(1) On the same week of the passage of the Act of 1871, in which we claim this burden was not imposed on the Missouri River Bridge of the Union Pacific, Congress imposed it on three other bridges, one over the Mississippi River at Louisiana, Missouri, one over the Missouri River at Glasgow, Missouri, and one over the Wabash River, declaring in each instance in specific terms that,

> "All railway companies desiring to use the said bridge, shall have and be entitled to equal rights and privileges in the passage of the same" (16 Stats., 474 and 600).

(2) That in the Act of 1866 Congress embodied in the St. Louis bridge section that portion of Section 1 of said act relating to the jurisdiction of the federal courts to try questions of obstruction to navigation, but entirely omitted the other provisions of the same Section 1 that other railroads should be permitted to use the bridge.

(3) The Act of 1866 was amended July 20, 1868, by which amendment the St. Louis bridge was declared to be a post road, and in this amendment, Congress again considering this subject, did not impose the burden

that this bridge should be used by other railroads desiring the same. (See 15 Stats., 123.)

We confidently assert that the intention and purpose of Congress was never more clearly established and shown in any controversy as to the construction and meaning of any law of the United States than here.

What, then, was the intention of Congress by this reference to the Act of 1866? Bearing in mind the contention, as above stated, as to whether the bridge, when completed, would or would not be a part of the Union Pacific Railroad, and thus subject to the provisions in the Pacific Railroad acts as to use by the Government for transmission of its mails and troops, it is evident that Congress intended by the phrase, "use and protection of said bridge and property," to refer to the *general* provisions of the Act of 1866, whereby the bridges were declared "lawful structures and recognized and known as post routes," thereby legalizing the construction of the bridge, approaches, depots, etc., if such legalizing was necessary, and binding them to the use of the Government for the transmission of its mails and troops.

It will not be presumed that Congress intended to do a thing beyond its power, and, as hereinafter shown at more length, we contend that it was beyond the power of Congress, if it so intended, to place this additional burden on the bridge, as to the first mortgage bondholders, and thus depreciate the value of their security. The bondholders at that time had a vested right in the bridge when completed as security for the debt owed them, which right could not be affected by any act of

Congress. True, additional burdens might be placed on the bridge as to the Union Pacific Railroad Company, the owner, with its consent, but not as to the mortgage bondholders. This act must be construed, if possible, so that its provisions are within the power of Congress. It must be clearly borne in mind that it was not an act to authorize the *construction* of the bridge, but to authorize a *bond issue* thereon.

The act is entitled:

> "An Act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa."

It would be unreasonable to suppose that Congress, after having given the Union Pacific Company, in the Acts of 1862 and 1864, authority to construct this bridge, without any conditions imposed as to its use by other railroad companies, would now in 1871, when the Union Pacific was coming before it with the request for assistance, asking simply for authority to borrow money on the security of the structure, impose new burdens on the bridge which were not contemplated when the authority was originally granted to build it. All the bridge acts, in which it was provided that the bridge should be open to the use of all railroads, were acts originally authorizing the *construction of* the bridge. None of them were acts supplemental to the original acts authorizing the construction, as in this instance.

It is to be constantly borne in mind that the Act of 1871 did not authorize the construction of the bridge,

but simply authorized the raising of money to pay for a bridge partially built. As was said by this Court in the Hall case (p. 353), in speaking of the Act of 1871:

> "There is no intimation in it of a distinct bridge franchise. It grants no power to build a bridge. Its main purpose, manifestly, was to give the company additional means and privileges for the completion of a structure already authorized."

The erection of the bridge was authorized by the Acts of 1862 and 1864, and was begun in 1868 (Record Evidence, p. 585). As the bridge was completed in February, 1872, one year after the passage of the bonding act, it must have been more or less under way at the time the bonding act was passed. While the Act of 1871 referred to the Act of 1866, it must be remembered that the Act of 1866 was not a bonding act, but authorized the construction of bridges. Now, it cannot be supposed that Congress, in its reference in the Act of 1871 to the Act of 1866, intended to incorporate such part of the latter act as by its terms necessarily related to bridges, the building of which had not been theretofore authorized. That is to say, a provision relating to a bridge, which was authorized by the act itself to be built, might very properly require that as a condition of the building of the bridge the company should permit other roads to use it, but why, when a bridge has been already authorized to be built as part of its road, and without any condition as to its use by other roads, and has been partially built, should it be assumed that such conditions were incorporated in an act which was passed to

raise money to complete such partially built bridge by reason of a reference in such bonding act to an act which contained general provisions, as well as specific conditions in regard to bridges authorized by such act to be built. In other words, the construction which is sought to be placed on the Act of 1871 would take from the railroad, that absolute use of, and property in, the partially constructed bridge, which it had acquired under the Acts of 1862 and 1864, and compel it to divide it with other railroads.

It must at least be conceded that grave doubts exist as to the intention of Congress to impose upon this bridge the burden of use by other railroads. Equity does not enforce the specific performance of contracts whose terms and obligations are uncertain or doubtful. If there is to be taken from this appellant the freedom of contract, the right to use its own property in its own way, the right to select its own associates, the right to choose its own partners, the authority to do so must be clear and undoubted. A court of equity ought not to impose such contractual relations as are sought in this case under any strained construction, by inference taken from vague and indefinite references.

We, therefore, earnestly and confidently submit that no authority was conferred upon other railroads to use the Missouri River bridge of the Union Pacific by any action of the Congress of the United States, and that the reference in the Act of 1871 to the Act of 1866 was to the general provisions of the Act of 1866, relating to the use and protection of the bridges therein authorized to be constructed.

SECOND POINT.

The power to alter, amend and repeal the charter of the Union Pacific Railroad Company did not give Congress the power to take from the Railroad Company property acquired by it in the exercise of its franchises and corporate powers; and its roadbed and the use thereof west of 20th Street, Omaha, could not be taken from it and given to another under the guise of an amendment of its charter.

I.

Numerous errors were assigned in our argument to the court below on the question of the holding of the lower court that appellee would have the right to use the tracks of the Pacific Company from Omaha to South Omaha and the terminal facilities and stockyard tracks there. This assignment seems to have been entirely overlooked by that court, and nowhere in the opinion do we find the question discussed or that right determined, they seemingly taking it for granted that if the right to go to Omaha was found, it necessarily carried with it the right to go to South Omaha.

We call the Court's particular attention to this branch of the case and the assignments of error in regard thereto as the mere suggestion of such demand on the part of appellee must shock the conscience of a court of equity.

As the discussion of one error involves necessarily the discussion of all, they are grouped in this subdivision of our brief.

The Bridge Mortgage Act of February 24, 1871,

provides that the mortgage to be given thereunder should cover:

> "The Bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress."

As we have heretofore shown, this act was passed solely for the purpose of enabling, authorizing and empowering the Union Pacific to raise funds with which to construct the bridge. We should, therefore, turn to the mortgage given in pursuance of this power, to ascertain what property was covered by that instrument.

This mortgage is found on pages 66 to 86, inclusive, of the bill of complaint, and the description of the property conveyed thereby, on page 74, is as follows:

> "All and singular the said bridge over the River Missouri, between Omaha and Council Bluffs, and the approaches thereof, and the appurtenances belonging thereto, including all parts and portions of said bridge now constructed or hereafter to be constructed, and the depots at Council Bluffs and Omaha as aforesaid, and the lines and tracks required to perfect the said bridge, its approaches and appurtenances, and to connect the same with the neighboring lines included in this conveyance as well the lines and tracks now constructed as those which may hereafter be constructed, and also all estates, terms and rights of way of the said bridge, approaches and appurtenances, as well now held by the company, as to be hereafter acquired by it, and all the rights and privileges of the said company of, in or to the said bridge, approaches or

appurtenances, or touching, concerning or appertaining to the maintenance, use and occupation thereof."

This would cover the property, as shown by the map, from the Transfer Depot in Council Bluffs to the Bridge Junction, or junction with the old main line of the Union Pacific, which is shown by the testimony to be at Twentieth Street in the City of Omaha.

We are met now with the startling and amazing proposition that under this act, this mortgage and this description, not only is the appellee entitled to the bridge and facilities to Twentieth Street, in the City of Omaha, but all of the property of appellant from there on through Omaha and into South Omaha, four and a half miles distant therefrom, and even one and one-half miles further on south and west from South Omaha to the town of Gilmore.

It is shown by the evidence in this case that the City of South Omaha was not in existence until after the years of 1888–1889. It is located about four miles from Twentieth Street in the City of Omaha. Prior to its incorporation as a city, and long subsequent to the passage of the Act of 1871, the packing houses of Swift, Hammond, Armour and others were erected in this vicinity, and the city was incorporated thereafter and grew up around these industries.

The act in question was approved February 24, 1871. The mortgage was given April 1, 1871. At the time of these events South Omaha was not even thought of.

The act, in title, phrase and under any reasonable construction of each and every provision thereof, was for the purpose of having a bridge constructed for connections

with railroads at or near Council Bluffs, Iowa, and Omaha, Nebraska, not South Omaha, or Valley, or Columbus, or Kearney, or North Platte, Nebraska, or Denver, Colorado. It never was in the contemplation of Congress that by the phrase "approaches and appurtenances," after the town had been designated, any use thereof should be extended to another depot in another town, along the main line of the railroad.

If under any strained construction it is held that the act contemplated the right to use the tracks to South Omaha, it might just as well be said that the right is given to use the track to Denver, or the end of the line. The fact that South Omaha lies near or adjacent to Omaha would make no more difference so far as the abstract right to the use of the tracks is concerned, than if it lay ten, twenty, a hundred or five hundred miles away.

Under the decree as entered by the Court below, appellee is entitled to the full, joint and free use of all tracks and side tracks between Omaha and South Omaha, amounting in all to about 80 miles of track; of the bridge; of the Omaha Union passenger station constructed in 1898, by Union Pacific Railroad Company; of side and spur tracks branching off and reaching in different directions from Omaha on to South Omaha; of tracks to various industries in the City of Omaha, to which the lines of appellant have been constructed. All of these facilities and terminals were purchased and acquired at great expense by appellant, yet under this far-reaching decree appellee is entitled to all of these privileges and others under the term "approaches and appurtenances."

It is shown by the evidence in the case that the west end of the bridge across the Missouri River is about 700 feet east from the original, natural and present level of the surface of the ground, and that the embankment from the west end of the bridge to the present natural level is about 700 feet in length. In other words, that at a distance of only 700 feet from the west end of *the bridge, the approaches end.*

By the term "appurtenances" is meant simply the facilities incident to the operation of the bridge, such as the connections with the tracks over the bridge, which we contended could, by no process of reasoning, be extended further than Twentieth Street in the City of Omaha.

Judge SANBORN, in the foreclosure proceedings, has distinctly and clearly outlined what is covered by the Bridge Division or the property covered by the Bridge Mortgage, and held that this covers the line extending from Council Bluffs to Bridge Junction in Omaha, and including the short branch at Council Bluffs. This would put the eastern terminus at Council Bluffs, Iowa, and the western terminus at the Bridge Junction or Twentieth Street, in Omaha, Nebraska.

The history of the Bridge Division is as follows: The Union Pacific was originally constructed from a point on the west bank of the Missouri River near the northeast corner of Section 10, Township 15, Range 13, in the State of Nebraska, and runs in a southwesterly direction about four miles to Bridge Junction, and thence westerly on the main line of the railroad now in use to a point about five miles west of Ogden, Utah. This was

the line of railroad on account of which the subsidy bonds were issued. The railroad was completed in 1869, and all the subsidy bonds were issued before 1870, and before the Omaha Bridge or its approaches were completed. In this condition of affairs Congress, in 1871, authorized the Union Pacific to issue bonds to the amount of $2,500,000, to raise money to complete the building of the Omaha Bridge, and to secure the payment of these bonds by a mortgage upon the bridge and its approaches. The bonds were issued and sold, and with the proceeds the bridge was completed.

So that the Bridge Mortgage Act of 1871, the mortgage and the decree, all show conclusively that the bridge and its approaches covered the property between Council Bluffs, Iowa, and Twentieth Street in Omaha, Nebraska, and no more, and this was the construction placed thereon by all parties at the time the mortgage was given and all transactions and operations thereunder have been carried on in accordance with that understanding. This division and description was made clear and distinct in the foreclosure proceeding. It was upon the ground that it was a distinct piece of property and a distinct division that the contention of the Government of the United States was overturned in those proceedings.

We are again confronted upon this branch of the case with expressions in the opinion in the case of *Union Pacific Ry. Co. vs. Chicago, R. & I. P. Ry. Co., supra.* In that opinion it says (p. 586):

> "For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri River, its

construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and tracks between Council Bluffs and Omaha, and we think that South Omaha was included."

* * * * * * * *

"It is true that it appears that from the depot to the point in South Omaha where the tracks of the companies connected is about four miles; but the scheme of Congress was to accomplish the more perfect connection 'at or near Council Bluffs, Iowa, and Omaha, Nebraska,' and we think this distance reasonably within the terms of the Act of 1871, liberally construed, as the act should be."

We respectfully but firmly contend that these expressions were not warranted by the issues or evidence in that case, and that if they are followed, a grave and serious mistake will be made and great injustice done to the appellant herein.

In that case the power to make the contract between the Union Pacific and the Rock Island companies was in question. By the terms of that contract it was agreed that the Rock Island Company should have, not only the right to use the bridge and terminal facilities at Council Bluffs and Omaha, but also the right to run to, and use the tracks and facilities at South Omaha. The property that the Union Pacific Company had solemnly contracted should be used, and for which lease was made, should under no circumstances be the gauge or measure by which in a proceeding of this kind the rights of the appellee are to be fixed and determined.

Yet the court below in the case at bar took this contract, as a measure of the rights of the appellee, and gave to it (irrespective of what should be determined by the court would be fair and right in equity, under all circumstances in the case), everything embraced in the contract and even went further and gave to appellee rights which the Rock Island and Milwaukee companies under their contracts, had never presumed to demand.

The rights of the Rock Island Company under that contract were entirely different from the claimed rights of the appellee in this equitable proceeding.

The contract in the Rock Island case had fixed clearly the extent and limit of the facilities. This being so, why, after having found that the contract was a binding one, thus determining the only issue in the case, should the opinion proceed to discuss the extent of the rights of the Rock Island Company after they had been irrevocably fixed by the terms of the contract itself.

The discussion was entirely unnecessary and uncalled for. No reason whatever is assigned why the Act of 1871 should be "*liberally construed.*" The Rock Island Company was making no claim under the Act of 1871 whatever. It stood upon the contract. Its cause was based upon the contract. The Union Pacific Company admitted the execution of the contract, but denied its power to enter into it, not because of the Act of 1871, but because it was without the general powers under its incorporation. There was no necessity for a liberal construction of the Act.

Even if it is admitted for the sake of argument that

the Union Pacific was compelled to allow other roads to use its bridge across the Missouri River, its approaches and appurtenances, that use should not be extended to another town four miles distant. Such a use of the track to South Omaha, under any possible construction, cannot be justly or logically injected into the act. The Court in the Rock Island case seeks to justify the use in its opinion of the expressions above quoted on the language in the first part of the Act of 1871, which is as follows:

> "For the more perfect connection of any railroads that are or shall be constructed *to the Missouri River, at or near* Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be and it is hereby authorized to issue bonds," etc.

The argument found at the bottom of page 588 of the Rock Island case, absolutely refutes the conclusion which is arrived at, as the Court there quoted from the case of U. P. R. R. Co. vs. Hall, 91 U. S., 343, as follows:

> "The scheme of the Act of Congress, then, is very apparent. It was to secure the connection of the main line with the Missouri and Iowa railroads," etc.

The moment that appellee is allowed to run into the Union Depot, the connection to which he refers is made, and if that was the purpose, why then go further and say that not only can this connection be made, but that the road can go beyond to an independent city on the line of the Union Pacific road, thus really making no

connection at all with the Union Pacific. The language quoted, "within these States at points at or near their western boundaries," was used because at the time this grant was made the depot locations had not been made, and Congress could not be any more definite than that unless it had added to that clause, "at such points at which depots may be hereafter established." This would be only surplusage, as any ordinary construction of the language used, taking into consideration the purposes for which it was used, would lead to but one conclusion, and that was that the connection would be made at the depots of the company rather than at some point out in the Nebraska or Iowa prairies.

Appellee relies upon the Act of 1866. It admits that there is no direct authority in the Act of 1871 that the bridge shall be used by any other railroad desiring it, but it does insist that the Act of 1871 refers to the Act of 1866, and so it is finally upon the terms of the Act of 1866 that its rights, whatever they may be, must be determined.

The only place in the Act of 1866 where anything is said about the use of bridges by other railroads is in the first section thereof, referring to the Quincy bridge. The portion of that section referring to that matter reads as follows:

> "And to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to

cross said bridge for reasonable compensation to be made to the owners of said bridge."

The only authority, therefore, in the Act of 1866 is to cross the bridge. When this has been granted, allowed or accomplished, the right ends. We admit that a reasonable construction of the "bridge" would cover the necessary approaches to get on or off the same, but the source of right and authority in this case is the Act of 1866 and the phraseology last above quoted.

If we have now a clear understanding of the provisions of this act bearing upon this question, let us consider what is meant by "at" or "near" or "opposite." Construing this language, "constructed to the Missouri River at or near Council Bluffs, Iowa, or Omaha, Nebraska," in connection with the language found in the Act of 1866, it means (if we concede that authority is given to cross) that any road terminating at or near Council Bluffs, Iowa, should have the right to cross the bridge over the Missouri River and enter Omaha, Nebraska; that any road terminating at or near Omaha, Nebraska, should have the right to cross the bridge and enter Council Bluffs, Iowa. Under no construction of this act can it be successfully claimed that any road terminating at or near Council Bluffs, Iowa, would have the right not only to cross the bridge and enter Omaha, Nebraska, but also to run on and over the company's lines to a point four miles distant in another town. Nor could it be successfully claimed that a railroad terminating at or near Omaha, Nebraska, would have the right to run its trains across the bridge, through Council Bluffs and on to Neola, Iowa, twenty miles distant.

But this is just the construction appellee is attempting to have placed upon these acts. Appellee, terminating at a point on the Missouri at or near Council Bluffs, Iowa, claims the right to cross the bridge, enter the Union Pacific depot in Omaha, and then to extend its line on and over four miles of track and enter South Omaha and use the terminal and stock facilities there.

If appellee's contention is correct that it can use the bridge, then by this language Congress meant to cover roads constructed to the Missouri River coming from the east or from the west. It would grant to the road coming from the east the right to cross the bridge into Omaha. It would grant to the road coming from the west the right to *cross* the bridge into Council Bluffs. This would give them the right "to cross the bridge," if such a right was intended by the Act of 1866.

We most earnestly urge upon the Court, and press on its attention, that the language is clear and explicit. There is no reason to place any strained construction upon this statute. There is no necessity for a liberal construction of these Acts. We insist that if there is occasion for any liberality, it should be exercised in favor of appellant.

II.

The construction placed by the court below upon the Missouri River Bridge Act of 1871, takes from the appellant the right to use its property west of 20th Street, Omaha, as it sees fit, and substantially confiscates it. Such confiscation is sought to be justified upon the ground that Congress had the power under the provision

in the granting acts of 1862 and 1864, permitting it to alter, amend or repeal the granting act, to diminish the security of the bondholders without their consent, and that the appellant having succeeded to the rights of the bondholders acquired such security in its diminished form.

The line of the Union Pacific Railroad Company west of 20th Street, Omaha, was built prior to the execution of the mortgage of March 1, 1865. Such mortgage covered the entire property of the railroad then existing, or which it might thereafter acquire. The property so mortgaged had been brought into existence by and was the result of the grant to the Railroad Company by the Government of certain rights and franchises. In this property the Union Pacific Railroad Company and the purchasers of the bonds secured by the mortgage of 1865, had certain vested interests, and the question is, whether such vested interests and such property and rights of property can be taken from the old original Congressional corporation and the holders of bonds secured by its mortgage, under a power to alter, amend or repeal the charter of a railroad company.

The property in the railroad west of 20th Street, Omaha, and its use, were the fruit and result of the grant to the Railroad by the Government of its franchises and corporate powers. While the result and outgrowth of such grant, it was not part of the grant itself, and the power to alter, amend and repeal a charter, as we understand it, has certain limitations and can only be exercised for the purpose of altering, amending or repealing that which was received by the corporation

from the State which created it. Such power to alter, amend and repeal does not, as we think, include the right to take from the corporation and the holders of its bonds secured by a mortgage upon its property without their oonsent, the property which it had acquired in the exercise of the corporate powers and franchises granted to it by the Government. In other words, to take from a corporation under the guise of altering, amending or repealing its charter, the property which it has acquired in the exercise of its corporate powers and franchises would be to confiscate and take from such corporation, its property without due process of law. This question was discussed by this Court in the *Sinking Fund cases*, 99 U. S., 700, where it was said at page 720, in referring to the acts of 1862 and 1864, incorporating the Union Pacific Railroad Company:

> "We are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. *That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.* * * * We think it safe to say that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administratior of its affairs, it retained the power to establish by amendment. In so doing, it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but

> it may provide for what shall be done in the future and may direct what preparation shall be made for the due performance of contracts already entered into."

It is certainly clear that the roadbed of the Union Pacific Railroad Company west of Twentieth Street, Omaha, and the use of such roadbed by the Railroad Company as it chose were property "acquired under the operation of the charter," and such property could not be taken from it by any amendment of its charter and franchises. As was said in the case of *In re Tiburcio Parrott*, 1 Fed. Rep., 481, 491:

> "It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property, the right to its lawful use and enjoyment."

In *United States vs. Union Pacific R. Co.*, 160 U. S., 1, 33, it was said by Mr. Justice HARLAN, in speaking for the Court in regard to the Union Pacific Railroad Company, as follows:

> "It would not be competent for Congress, under the guise of altering and amending the act in question, to impose upon the railroad company, duties wholly foreign to the objects for which it was created, or for which governmental aid was given. Neither could it, by such alteration and amendment, destroy rights actually vested, nor disturb transactions, fully consummated."

In the case of *Rice vs. Minn. & Northwestern R. Co.*, 1 Black, 360, one of the questions was whether the defendant acquired any right, title or interest in the lands in controversy by virtue of the provisions of its

charter, and it was held that if it did, then that a repeal of such charter could not deprive it of its land. At page 373 it was said:

> "If the defendants acquired such a right, title or interest in the lands under their original charter, then it is clear that it became a vested interest as soon as the act of Congress went into effect, and on that state of the case, it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void, and of no effect."

In *Coast Line R. Co. vs. City of Savannah*, 30 Fed. Rep., 646, 650, an act of the Georgia Legislature attempting to authorize the defendant city to compel plaintiff to leave three feet on each side of their track was held unconstitutional. The Court said:

> "It is competent for the State, in the exercise of its reserved power (Code 1682) to alter the act incorporating the company in all particulars constituting the grant to it of corporate rights, privileges and immunities. These flow from the State and should properly be kept under its control. But where the corporation has, by contract or otherwise, acquired vested rights, it is not competent for the legislature to take them away. The State cannot undo what has already been done. It cannot unmake contracts that have already been made. All such rights of the corporation legally acquired are equally beyond legislative interferences."

In *Detroit* v. *Plank Road Co.*, 43 Mich., 140, 144, 147, the State had in 1879 passed an act forbidding a plank road company to maintain a toll-gate within the corporate limits of a city without the consent of the

local authorities. The limits of the City of Detroit having been extended so as to embrace a portion of the road and a toll-gate of the respondent company, the city brought mandamus to compel the removal of this toll-gate. The charter of the respondent was by its express terms subject to amendment. The Court held that the "mandamus must be denied" and said (COOLEY, J.):

> "The effect of this legislation, if valid, would be to take from respondent about two miles and a half of the road upon which it now collects toll. It is not pretended that this is done by reason of any forfeiture done or suffered by the respondent, and if it were, a judicial finding would be necessary. *Flint, etc., Plank Road Co. v. Woodhull, 25 Mich., 99.* Nor is it clamed that the act of 1879 was passed as a regulation of police. It would probably be conceded that it goes quite beyond the competency of an act of mere regulation, and that it must be sustained if at all, as an act passed in the exercise of that complete power to amend and repeal, which was reserved in passing both the general act of 1848 and the charter of respondent. The City relies upon it as an exercise of that power and not otherwise.
>
> "* * * (p. 147). But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany, etc., R. R. Co. v. Brownell, 24 N. Y., 345,* is an illustration. It was there decided that although the legislature

might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes, to the same burden, except in connection with provision for compensation. The decision was in accord with that in *Commonwealth v. Essex Co., 13 Gray, 239, 253*, in which, while the power to alter, amend or repeal the corporate franchises was sustained, it was at the same time declared that 'no amendment, or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted'. The same doctrine is clearly asserted and affirmed in *R. R. Co. v. Maine, 96 U. S., 499*, and is assumed to be unquestionable in the several opinions delivered in the *Sinking Fund Cases, 99 U. S., 700.*

"But for the provision in the Constitution of the United States, which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be, if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in

England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the 'law of the land.' Even municipal corporations, though their charters are in no sense contracts, are protected by the constitution in the property they rightfully acquire for local purposes, and the State cannot dispoil them of it. *Territt v. Taylor*, 9 Cr. 43; *Pawlet v. Clark*, 9 Cr. 292; *State v. Haben*, 22 Wis. 660; *People v. Common Council*, 28 Mich., 228.

"* * * What the state claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation.

"It may be that what the legislature of 1879 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond

the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences. But even such inconveniences must be trivial, since the power to appropriate private property to public uses is always ample and always at command."

In *People vs. O'Brien*, 111 N. Y., 1, 34, a street railway company acquired from the City of New York the right to lay its tracks and run its cars over Broadway; and thereafter mortgaged its property and franchises. The legislature, pursuant to its reserved power, repealed the company's charter. The question involved is stated in the court's opinion as follows:

"In other words, we think the material question for discussion here is whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation."

In the course of the opinion, the Court said at p. 36:

"It is, therefore, urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads fell with the repeal, and could not be enforced.

"If it could be supposed for a moment, that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities.

"The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution

gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature, or even the framers of our Constitution, in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution.

* * * * * * * *

"These rights of property having been acquired and created under the express sanction and authority of the State, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the State to alter, amend and repeal laws or charters (p. 44).

* * * * * * * *

"We are, therefore, of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon and for the transportation of freight and passengers, which survived its dissolution" (p. 55).

In *Millar vs. R. R. Co.*, 21 Barb., 513, 515, where the defendant's charter contained the usual reservation, it was held that a subsequent act of the legislature requiring the defendant to cause a new highway to be

taken across its track and to cause all necessary embankments, excavation and other work to be done on its road for that purpose, and (inferentially) at its own expense was unconstitutional, and said:

"The power reserved to the legislature to alter, modify or repeal the defendants' charter, did not purport to authorize the assumption of their property without compensation. No power to do that could have been reserved, for none could have existed. It would be preposterous to say that the legislature has the power to make any and every requisition upon the defendants as a condition of their retaining their corporate existence. To require them for instance, to make donations to the towns through which their railroad may pass, or any other body politic or to individuals."

In *Johnson vs. Goodyear Min. Co.*, 127 Calif., 4, an act of the California legislature giving laborers liens for wages in the property of the employer corporation, was held unconstitutional, the Court saying, at page 17:

"It is said that corporations being the creatures of the State, and deriving their powers from their charters, the same power that created them may alter or amend their charters or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation, and while it exists, deprive it of the rights guaranteed to it by the federal constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws."

In *Orr vs. Brackton County*, 81 Ky., 593, 596, the Court said:

> "The right to amend the charter may be expressly reserved, but that right does not confer the power of taking from the corporators the control of the corporate property, or to change the object of the charter by taking from those having a right to select their officers under the charter, that right, and placing it in the hands of those whose stock, by reason of the increased power conferred by the amendment, are enabled to control the corporation. The right was not asked by the corporation, but granted by the legislature at the instance of a few stockholders without the consent or knowledge of the others. Conceding the right of the legislature to make the amendment, the corporation declined to accept it, and therefore the order entered below requiring an election must be reversed and cause remanded, with directions to set aside the order and for further proceedings."

It will, of course, be conceded that the right of the Union Pacific Railroad Company to use its tracks in its own way is proper. To compel it to make an involuntary arrangement with another railroad, by which the latter shall use its property, is to make its property thereby less valuable, and to enforce against its will a division of its property with another, is to deprive it of such property without due process of law. The question whether such property could be taken from it and from the holders of its bonds by an amendment to its charter without their consent was not considered or discussed in the case of Union Pacific R. Co. vs. Chicago,

Rock Island & Pacific R. Co., 163 U. S., 564. There is no suggestion of this subject either in the briefs of counsel or in the opinion of the Court. It was not presented or argued in any way, and the Rock Island case can not be considered an authority upon the proposition, which is certainly squarely presented to the Court in this case.

Whatever may be said as to the other questions involved, it is certainly clear that the question now under discussion was never brought to the attention of the Court in the Rock Island case, viz.: whether property acquired by a corporation by virtue of franchises received by it from the government, which has been mortgaged, can subsequent to the mortgage be taken from the bondholders without their consent under the power reserved by the act of incorporation permitting an amendment, alteration or repeal of its charter.

There is no evidence in this record that the bondholders of the old Union Pacific Railroad Company ever consented to the security for their bonds being taken from them and materially diminished by the use of the tracks belonging to their mortgagor being given to another railroad. The value of the security which the bondholders had was in its use as a railroad. All that there is of value in a roadbed and tracks is their use. To say, therefore, that such use, which is the real security for the bonds, can be taken from their mortgagor and therefore from the bondholders without their consent is in effect to confiscate their security. The tracks west of 20th Street, Omaha, were built prior to the mortgage of 1865. At the time of the execution of

such mortgage no other railroad had the right or power to compel the Union Pacific Railroad to permit it to use them. The mortgagor therefore gave to the trustee under the mortgage the property which it then had in the condition in which it then held it, viz., that it could not be compelled to share it with another railroad. It was then free to do with it as it chose and to change such conditions as against such bondholders without their consent would be in effect to take their property without due process of law and we repeat again the words of Chief Judge RUGER in People vs. O'Brien, 111 N. Y., 1, 36, that

> "The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine."

The State gives to a corporation the right to do business upon certain terms, and these terms it can change or alter or entirely take away from the corporation, if it sees fit to do so, under the reserved power to amend, alter or repeal its charter. It is, however, difficult to see upon what theory it can in the exercise of

its reserved power take from the corporation anything more than what it has given. The roadbed west of Twentieth Street, Omaha, and its use were acquired by the exercise of the corporate powers of the Company, and were property in which it had a vested right which could not be taken from it, and we confidently submit that on principle and under the authorities cited, the power reserved to the government to amend, alter or repeal the Union Pacific charter is limited to an amendment, alteration or repeal of that which was granted by the government, and did not give Congress power to confiscate property which was acquired as a result of the exercise of the franchise and powers given the Railroad Company by the United States and which had been previously mortgaged to secure its bonds.

We, therefore, respectfully submit that the appellant when it purchased at foreclosure sale the property, which had been mortgaged to secure the bonds, unquestionably purchased the right to use the tracks west of 20th street, Omaha, as it pleased and can not be compelled to share the use thereof with any other road. In other words the appellant stands in the shoes of the bondholders and acquired what rights they had in the security for their bonds, and as we have shown before, their right and the right of their mortgagor to the use of such tracks at the time of the execution of the mortgage was absolute and unqualified and in no way subject to the use thereof by any other road and could not be subsequently taken from them without their consent.

THIRD POINT.

The appellant under the foreclosure of the mortgage of March 1, 1865, acquired the properties of the old company free and clear of any lien, charge or duty, of or to the United States, under any act of Congress, except as specified in the decree of foreclosure.

After the organization of the Union Pacific Railroad Company, by the government of the United States, under the Acts of July 1, 1862, and July 2, 1864, there was placed upon the line of the Company what is known as the Union Pacific First Mortgage of March 1, 1865, which is referred to on page 592 of the Record, Evidence, Vol. II., herein. In said mortgage and as security for the bonds issued thereunder the following-described property was mortgaged:

> "All and singular the railroad and telegraph of the said party of the first part [the said Union Pacific Railway Company] heretofore constructed or hereafter to be constructed, from a point on the western boundary of the State of Iowa, heretofore fixed by the President of the United States, pursuant to the terms and provisions of said Acts of Congress, to wit, at the City of Omaha, in the Territory of Nebraska; thence, as provided in said Acts of Congress, through the territories of the United States to the western boundary of the late Territory of Nevada, together with all its lands, tenements, hereditaments, rights of way and easements, acquired or appropriated, or which shall be hereafter acquired or appropriated, for the purpose of a right of way for a single, double or other track railroad and telegraph lines, and for depots, engine-

houses, car-houses, station-houses, warehouses, machine shops, superstructures, erections and fixtures being necessary for the use of said railroad and telegraph, and also all and singular the franchises now owned, possessed or acquired or which shall be hereafter owned, possessed or acquired by the said party of the first part, for the purpose of building and operating said railroad and telegraph above specified and described; and also all the rails, depots, yards, engine-houses, car-houses, station-houses, warehouses, machine shops, workshops and fixtures of said party of the first part; and also all goods and chattels now owned, or which shall hereafter be owned or acquired, by said party of the first part, necessary to said railroad and telegraph line, or the running and operating the same."

This description would include every bridge and every foot of property from the initial point upon the eastern bank of the Missouri River westward so far as the line ran. As has been before shown, this bridge was part of the road as an entirety, and its construction was commenced in the year 1869, under the original grant from Congress.

"If we are correct in this conclusion, it seems to be clear that the bridge over the river, built by the railroad company, is a part of their railroad, and required by law to be so operated. It was commenced in 1869 under the Acts of 1862 and 1864."

Union Pacific R. R. Co. vs. Hall, 91 U. S. 343, 352.

"That said railroad company finally determined to build a permanent railroad bridge across said river between Omaha and Council Bluffs at the

place where the present bridge is located, and commenced work thereon or in preparation therefor in the latter part of the year 1868, and during the year 1869" (Master's Report, Record, Evidence, Vol. II., pp. 584, 585).

"That said railroad company acquired lands for its terminals and bridge approaches in Council Bluffs, in about the year 1866, which terminal grounds are the same as those upon which the present terminal station of said railroad is situated, and that thereafter and during the period of the construction of said railroad and until a permanent bridge was constructed across the Missouri River as hereinafter stated, said railroad company received and delivered freight and passengers to and from its line of railroad at its station in Council Bluffs, in the State of Iowa, by means of railway tracks from said station to the easterly bank of the Missouri River, and thence across said Missouri River to connections with its track constructed as aforesaid on the westerly bank of said river, at various points from the point of the commencement of construction hereinbefore referred to, to a point about two and one-half miles southerly from said point, and that the transfer across the Missouri River was effected by means of ferry boats during the season when such boats could be operated and used, and by means of tracks resting upon temporary piling during the winter season of each year" (Master's Report, Record, Evidence, Vol. II., p. 584).

After the First Mortgage was placed upon the property and road as an entirety, and after the commencement of the construction of the bridge, as hereinbefore mentioned, and after the sale of all the First

Mortgage Bonds (see opinion of Judge Sanborn, Record, Evidence, Vol. I., p. 352), it was thought that additional funds would be necessary to complete the construction of the bridge, and so a supplemental mortgage was placed upon the bridge and appurtenances, and money was raised thereby and the bridge completed. The bond issue was made under the Act approved February 24, 1871.

In the foreclosure proceedings under which the present Union Pacific Railroad Company acquired its title to the property, it was decreed that under the First Mortgage of 1865, heretofore referred to, the mortgagees were entitled to a foreclosure of their said mortgage as against all other outstanding interest, but in the exercise of the equitable jurisdiction of the court, it was decreed that the Bridge Mortgage should not be cut out as a lien upon the bridge and appurtenance commonly referred to as the Bridge Divisional, but that the purchasers should assume this Bridge Mortgage indebtedness. So that the Union Pacific Railroad Company obtained the absolute fee title to the entire system subject to the payment of the Bridge Mortgage bonds.

By this sale and purchase the present Union Pacific Railroad Company received in fee whatever interest was granted to the mortgagees under the original First Mortgage of 1865, and as heretofore outlined, this was the absolute right to the entire line of the Union Pacific Railroad, from its eastern terminus in Iowa westward, including the bridge, free and untrammeled from any subsequent liens or burdens imposed either by the original Union Pacific itself or by any governmental law.

The language of the decree is as follows (Record, Evidence, Vol. II., p. 752):

"It is further ordered, adjudged and decreed, that in default of such payment by the defendant the said The Union Pacific Railway Company, or by some one claiming under it, or by some one for its account, or by some of the defendants herein, within the time directed as aforesaid, all the railroad, telegraph, franchises, rights, functions, immunities and appurtenances to the same belonging, rolling stock and property of every kind and description embraced in and covered by said First Mortgage of November 1st, 1865, shall be sold as hereinafter directed, and all the right, title, estate, interest and equity of redemption of the said defendant The Union Pacific Railway Company and of all persons claiming or to claim, under it, and of F. Gordon Dexter, and Oliver Ames, 2nd, Trustee, and of the United States of America, and of each and every defendant in this cause, of, in or to the said railroad, telegraph, franchises, rolling stock and property, and every part and parcel thereof, embraced in and covered by said First Mortgage of November 1st, 1865, shall be forever absolutely barred and foreclosed saving only the rights and title of the American Loan and Trust Company, Trustee, of the said Equipment Trust Indenture of October 1st, 1887, and the rights and liens of the trustees of the Omaha Bridge Mortgages of April 1st, 1871, and September 27, 1871, and the Omaha Bridge Renewal Mortgage of October 1st, 1885, and saving and excepting the right of the government to have the preference at all times" (Record, Evidence, Vol. II., pp. 752, 753).

"The purchaser or purchasers and his or their

successors or assigns, shall, after such delivery of the premises and property, hold, enjoy and possess the same and all the rights, privileges, immunities and franchises thereto appertaining, with the right to own, hold, enjoy, maintain and operate the said railroad and property as fully and completely as the Union Pacific Railroad Company held, owned and enjoyed the same at the time of the execution of the said First Mortgage or at any time thereafter, and as fully as the defendant The Union Pacific Railway Company has heretofore held, owned or enjoyed or now holds, owns or enjoys the same, and the purchaser or purchasers, and his or their successors and assigns, shall thereupon be entitled to have and to hold the said premises so conveyed, by a full, absolute and indefeasible title, freed and discharged from all the mortgages, liens, claims and charges of each and every defendant herein and of all parties to this cause, saving and excepting the right and title as hereinbefore defined of the American Loan and Trust Company, as trustee of the Equipment Trust Indenture of October 1st, 1887, and the mortgage lien, claims and charges of the trustees of the Omaha Bridge Mortgages of April 1st, 1871, and September 27th, 1871, and of the trustee of the Omaha Bridge Renewal Mortgage of October 1st, 1885, and the holders of the outstanding and unpaid bonds issued under and secured by said bridge mortgages respectively, and saving and excepting also the right of the government," etc. (Record, Evidence, Vol. II., p. 761).

To ascertain the title which the present owners of the road possess, it is necessary to turn to the final decree as handed down by Judge SANBORN. Let us see

how far the Court imposed these Bridge Mortgages as a burden upon the defendant company. Turning to page 731 of the Record (Evidence, Vol. II.), we find the following:

> "And said First Mortgage is a lien subordinate and inferior to the lien of the Omaha Bridge Mortgage of the Union Pacific Railroad Company to John Edgar Thomson, John Pierpont Morgan and Elisha Atkins, as trustees, dated the 1st day of April, 1871, and to the indenture supplemental thereto, dated the 27th of September, 1871, and to the Omaha Bridge Renewal Mortgage executed by the Union Pacific Railway Company to the Central Trust Company of New York, as trustee, dated the 1st day of October, 1885, upon, to the extent and in respect of the premises embraced in and covered by the said Bridge Mortgages, and *to the extent of the indebtedness thereby secured*, as hereinafter found to be outstanding and unpaid."

Here in so many words is a distinct finding as to how much of this Bridge Mortgage is foisted upon this defendant company in the decree, and the court, in order to cut out all such complications, restrictions and impositions as appellee is attempting to impose upon the defendant, has limited the liability merely to "*the extent of the indebtedness* thereby secured."

In effect, the decree thereby cuts out all other conditions which it has been argued followed the granting of the permission by the United States to place upon the Bridge Division this Bridge Mortgage.

Quoting further from the Decree (Record, Evidence, Vol. II., p. 732):

"That said First Mortgage of November 1, 1865, is with the exceptions last above stated and decreed [or with the exception of a lien to the extent of the indebtedness secured by the Bridge Mortgage], a valid and subsisting first mortgage and lien superior and paramount to any and every lien, estate, right, title, interest or claim, of any person, party or corporation whomsoever, including the United States of America, upon all the railroad, telegraph, premises, rights, franchises, lands and property described in said mortgage, including the railroad, right of way, and railroad property of the Union Pacific Railway Company extending from the eastern terminus of the Union Pacific Railway on the east line of the said Railway Company's property between Twelfth Avenue and Thirteenth Avenue in Council Bluffs, Iowa, in a westerly direction to Twentieth Street in Omaha, Nebraska, including the railroad and railroad bridge across the Missouri River and extending from the initial point, etc."

So that the Court, by its decree, specifically cut out every right of every person whomsoever, except the right of the bondholders under the Bridge Mortgage to have their bonds paid in due course.

Turning to page 429 of the Record (Evidence, Vol. I.), we find that there was conveyed by the Master's Deed:

"All the railroad, right of way, and railroad property of the Union Pacific Railway Company extending from the eastern terminus of the Union Pacific Railway on the east line of the said Railway Company's property between Twelfth Avenue and Thirteenth Avenue in Council Bluffs, Iowa,

in a westerly direction to Twentieth Street in Omaha, Nebraska, *including the railroad and railroad bridge across the Missouri*, * * * (Page 441.) And subject to and saving the lien of the Omaha Bridge Mortgage of the Union Pacific Railroad Company, * * * upon and in respect of the premises embraced in and covered by said Bridge Mortgages, and *to the extent of the indebtedness* thereby secured and in said decrees found to be outstanding and unpaid."

So that we find both in the decree itself and in the deed, that an absolutely clear title to the property is given to the purchasers, free from all claims, rights or reservations in favor of the United States Government or any other party whomsoever, and not subject to the bridge mortgages, but subject to the payment of the indebtedness secured by said bridge mortgages and found by the decrees to be outstanding and unpaid.

Great stress has been laid by counsel for appellee upon the decision in the case of *Joy vs. St. Louis*, 138 U. S., 1, as bearing on the case at bar. The cases, however, are easily and clearly distinguishable. In principle there is absolutely nothing in common between them, as bearing on the rights of the purchasers at foreclosure sale.

In the Joy case the mortgage was not made until long after the tripartite agreement had been entered into, and in fact in the mortgage itself reference is made, directly or indirectly, as the Court distinctly holds:

"Therefore, the Wabash Company, the mortgagees, and purchasing committee must be held to

have had notice of the covenants and conditions of the tripartite agreement *prior to the execution of the mortgage*, and are bound by them, whether the covenants be or be not strictly such as run with the land" (p. 35).

(p. 37) "Thus this deed refers to the contract of August 11, 1875, between the County Company and the Kansas City Company, and to the terms thereof; and the Kansas City Company took its title subject to the terms and conditions imposed upon the County Company by the tripartite agreement. This reference to the terms and conditions on which the right of way mentioned in the deed was granted to the Kansas City Company put all the parties to the deed, and their assigns, on inquiry as to the terms of the contract by which such rights of way were granted, and led up to the provision in the agreement of August 11, 1875, between the two companies, which referred to the tripartite agreement in the following language:

* * * * * *

"Being thus chargeable with notice of the contents of the contract of August 11, 1875, between the County Company and the Kansas City Company, *the mortgagees and purchasing committee were chargeable also with notice of the tripartite agreement*, to which it referred; and they *purchased subject to the terms on which the right of way was granted.*"

We desire to explain our position a little more fully in reference to the rights which defendant claims it acquired as purchaser under the foreclosure of the First Mortgage of March 1, 1865, and to do this we deem it necessary, at the risk of being tedious, to go over in de-

tail the matters in connection with the issuance of said First Mortgage Bonds and the passage of the Bridge Mortgage Act of 1871.

The Pacific Railroad Acts of 1862 and 1864 authorized and required the original Union Pacific Company to construct a railroad from the western boundary of the State of Iowa westward. It has been held in the *Hall case*, 91 U. S., 343, that the Act of 1862, by implication, and the Act of 1864, expressly authorized the construction of the bridge across the Missouri, and that said bridge was built under the authority of said acts, and was part of the Union Pacific Railroad authorized by said acts.

On March 1, 1865, a First Mortgage was made covering all the railroad line, then constructed and to be constructed and of course necessarily this included the bridge when constructed. Under this mortgage $27,000,000 of bonds were issued, and all were sold by 1869, and the construction of the bridge was commenced in 1868–69. It is our contention that by the issuing and recording of said First Mortgage, the bondholders purchasing the bonds secured thereby, acquired a first lien on all the railroad, including the bridge when constructed, the value of which lien could not be impaired or depreciated in any way by the government or any one else without their consent, and that thereafter the Government could not, as to said bondholders, impair their security by placing any additional burden on the bridge, which had not been imposed prior to March 1, 1865, in the way of making the bridge subject to be used by any railroads desiring it, or in any other way,

without the consent and acquiescence of said bondholders.

The next step was this: The Union Pacific Company, running short of funds, went to Congress and asked authority to place a separate mortgage on the bridge and appurtenances, making it a first lien, and to borrow money on said mortgage. Congress, by the Act of February 24, 1871, granted this authority, and it was in this Act of 1871 that this reference was made to the Act of 1866, whereby it is claimed the bridge is subject to use by other railroads. Of course, as explained in the prior branch of this argument, we contend that such was not the intention of Congress, and that by said Act not even the original Union Pacific Company was bound to allow the use of its bridge to other railroad companies. But now, irrespective of that question, we contend that whether Congress intended to so burden the bridge as to the original Union Pacific Company, it did not intend to, nor did it have the power to so burden it as to the lien and vested rights of the First Mortgage bondholders. We will admit that as between Congress and the Union Pacific Railroad Company, the bridge could be so burdened by agreement between them, but we contend as to the First Mortgage bondholders and their vested rights as to the security of the bridge, any such proceeding, unless with their *consent*, would be entirely void and not binding on them; that is to say, Congress could not without the consent of the bondholders, impair or affect in any way their security which they had acquired on the *whole* line of railroad including the bridge, by the mortgage of 1865, by placing any prior

lien on the bridge or by imposing any further conditions on it, such as use by other roads, which of course would depreciate its value to them as security.

The next step was the foreclosure in 1898, of the mortgage of March 1, 1865, by which the present Union Pacific Railroad Company acquired its title to the railroad. The terms of sale are more fully referred to above. In that foreclosure there was a contest as to the priority of the original First Mortgage of 1865, and the Bridge Mortgage of 1871, as to the bridge and appurtenances, and the Bridge Mortgage won out. The whole line of road including the bridge was ordered sold, to satisfiy the mortgage of 1865, but subject to the payment of the Bridge Mortgage to the extent of the amount thereof.

Irrespective of the question as to the Bridge Mortgage being a first lien on the bridge, which is not in this case, we now come to the question as to whether the reference to the Act of 1866, in the Act of 1871 (assuming for the sake of argument it was intended thereby to make the bridge open to the use of other roads), was binding as to the First Mortgage bondholders. That question has not been adjudicated and is still an open one.

We admit that Congress could depreciate the lien of the United States as to the subsidiary Bonds by imposing further burdens on the bridge, as making it subject to the use of other roads, if it so desired, and we also admit that the Union Pacific Railroad Company could agree to depreciate the value of its bridge by accepting the condition that it might be used by any other road

desiring it, if it desired, but we contend that as to the *lien and vested right* which the First Mortgage bondholders acquired by the mortgage of 1865, the value of the property covered by this lien, which included the bridge, could not be impaired or depreciated in any way by Congress or any one else, without the consent and acquiesence of said bondholders. That is to say, Congress could not, as to the bondholders, without their consent, impose the burden on this bridge of permitting it to be used by all other roads (as it claimed it endeavored to do by the Act of 1871) and thus depreciate to that extent the value of the bondholders' security and therefore, as to the bondholders, that provision would be of no force and not binding.

This being so, the purchaser at the foreclosure sale, the new Union Pacific Company, would not be bound by that provision. The new company was not a *purchaser from the old company*. What it did do was to buy the property subject to the burdens that were on it when the First Mortgage was given in 1865, it simply stepped into the shoes of the bondholders, and no burdens on the property which would not be binding on the bondholders would be binding on the present Union Pacific Company. It is very clear that this must be the rule. If a person, after mortgaging property, could subsequently burden it with easements and conditions which would be binding on the mortgagee, the mortgagor could so burden it that the security of the mortgagee would be practically, if not totally, destroyed. We do not believe that any such doctrine has ever been sustained by any court.

It has been urged that the whole matter of the Bridge Mortgage Act was done for the benefit and protection of the First Mortgage bondholders equally with the Union Pacific, and that therefore they cannot complain and will be held bound. But this argument has no force. If it was desired to help the bondholders by doing anything which bore on their vested rights in the road, they should have been called in and consulted and given the opportunity to be helped or not as they desired. There is no principle of law which provides for compulsory assistance in a case of this kind. It would be a dangerous precedent to establish, and the courts will not countenance it. Looked at from any standpoint, the conclusion is irresistible that the provisions in the Act of 1871 were not binding or of any force and effect as to the First Mortgage bondholders, nor can they affect the rights of the purchaser, the present Union Pacific Railroad Company.

We repeat that in the main case relied upon by appellee on the question of successorship, *Joy vs. St. Louis*, *supra*, the facts were totally different from those in the case at bar. In the Joy case all the matters in controversy, the agreements, deeds, etc., were done, entered into and placed on record long prior to the execution of the mortgage, and the Court held there was notice of all the matters involved to the mortgagees before they accepted the mortgage as security. In our case the mortgagees had no notice, at the time of accepting the mortgage, of any provisions with reference to the use of the bridge. They took the mortgage on the bridge free and clear of any such provision, and

they cannot be held bound by any subsequent provision to that effect, if there was any such.

In the case of Toledo, etc., R. R. Co. v. Hamilton, 134 U. S., 296, it was held:

"A recorded mortgage, given by a railroad company on its road bed and other property, creates a lien whose priority cannot be displaced thereafter either directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of *original construction*. * * *

"The priority of a mortgage debt upon a railroad has been sometimes displaced in favor of unsecured creditors, when those debts were contracted for keeping up a railroad, *already built*, as a going concern; but those cases have no application to a debt contracted for *original construction*" (Syllabus).

Again, at page 301, the Court said:

"There was no statute in force *at the time the mortgage was executed*, giving any priority to subsequent mechanic's liens; and by the mortgage the mortgagee took its *vested priority*, beyond the power of the mortgagor or the *legislature* thereafter to disturb."

"Acting as he did with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the *bondholders* had joined with the company in making the contract. No *effort appears to have been made to induce them to become a party to the agreement*, and it is now too late to remedy the oversight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad

mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied. Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but suffice it to say, that in the view of this court the argument is not sound, and we think that the weight of judicial determination is greatly the other way. (Citing cases)."

Dunham vs. Ry. Co., 1 Wall., 254 (257).

Quoted in *Toledo R. R. Co. vs. Hamilton*, *supra*.

The fact that part of a road was entirely built by money raised on a subsequent mortgage, does not give it priority over prior mortgages which lawfully cover the whole road.

Galveston R. R. Co. vs. Cowdrey, 11 Wall., 459.

An agreement resting wholly in contract cannot be enforced against a new corporation which has purchased the property of a former one upon foreclosure sale.

Sullivan vs. R. R. Co., 94 U. S., 806.

On this question of successorship, counsel for appellee seem to base their argument on the theory that the present Union Pacific Railroad Company is a *purchaser* from the old Union Pacific Company. This is entirely erroneous. The present Union Pacific Company is a purchaser of all the rights and properties originally *mortgaged* by the old Union Pacific Company to the

First Mortgage bondholders. As soon as the mortgage was made, the bondholders acquired vested rights which could not be changed or impaired by any subsequent acts or contracts of the mortgagor or by any subsequent acts of the legislature. The present Union Pacific Company does not succeed to the rights of and step into the shoes of the old Union Pacific Company. It derives its rights through the bondholders, and whatever rights the bondholders acquired by the mortgage, the present Union Pacific Company possesses by virtue of the foreclosure sale.

Counsel for appellee in their brief in the court below said:

> "Covenants creating an easement which do run with the land are binding upon all *purchasers*, and covenants not running with the land are always binding upon purchasers with notice, provided they have reference to the use of the property."

If it is admitted that it is true with reference to *purchasers from the owner* of the property, it certainly cannot be true that this rule would apply in the case of a purchaser at a mortgage sale, who acquired the rights and properties which had been mortgaged, that is to say, that any burdens or easements placed on the land by the owner subsequent to the giving of the mortgage, would have any effect as to one acquiring said mortgaged rights and properties under mortgage foreclosure sale. If this were true, the mortgagee would never know what security he was getting under a mortgage. As we have stated above, if a mortgagor could, subsequent to the giving of a mortgage,

affect the mortgagee's rights by placing burdens and easements on the property mortgaged, it is very apparent that the mortgagee's security might thereby be very appreciably impaired, if not entirely wiped out. The mere statement of the proposition will show its fallacy.

An examination of the cases cited by counsel for complainant in their brief in the court below, will show that they have no application to the case at hand. In the case of *Chicago, M. & St. P. Ry. Co. vs. Chicago*, 183 Ill., 341, there is no such question as is involved in this case. In that case the railroad company was a *purchaser direct* from the old company, and not a purchaser at foreclosure sale of rights previously mortgaged, and in addition the very right and power *originally granted* to build and operate the railroad in the street was hedged in with conditions, which the court held were binding on the purchaser. That is, the only right the railroad company had in the street was derived from the ordinance which imposed such conditions. In other words the ordinance was a link in the chain of title of the company to the use of the street, and without it the Company would be a trespasser; hence *deriving its title* through the ordinance it was bound by its provisions.

Again, in the case of *Parker vs. Nightingale*, 6 Allen, 341, Nightingale knew at the time he acquired the lease that the lessor, the party through whom he derived his title, was bound not to run a restaurant on the premises, and that his power as lessee, in connection with the premises could be no greater than that of his lessor, hence he was enjoined by the Court from carrying on said business on the premises.

So, in the case of *Kirkpatrick vs. Peshine*, 24 N. J. E., 206, the party, who was enjoined from erecting a building within twelve feet of the street, was a purchaser of the fee title direct, subsequent to the recording of the agreement that the property should not be so used. He did not purchase the rights of the mortgagee to said property, acquired prior to the recording of the agreement.

Counsel quoted from the opinion of Lord Justice Knight Bruce, in the case of *De Mattos vs. Gigson*, 4 De G. J., 282, as follows:

> "'Reason and justice seem to prescribe, that at least, as a general rule, where a man, *by gift or purchase*, acquires property from another, with knowledge of a *previous* contract, lawfully, and for a valuable consideration, made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use the property in a manner not allowable to the giver or seller.'"

We have no dispute with this rule. It will be noticed that the rule as announced applies to the case where a man, by *gift or purchase*, acquires property from *another*, with knowledge of a *previous* contract. This is in line with our contention. The Union Pacific Company did not acquire the road and bridge "by gift or purchase from another with knowledge of a previous contract," within the meaning of the rule as laid down. What it did was to purchase the rights and properties which had been mortgaged long prior to the placing of

this alleged burden on the bridge. It did not acquire this property "by gift or purchase from another" (meaning the owner). It purchased the property at mortgage foreclosure sale and procured its title from the court.

We have thus far in this branch of our argument referred only to the effect of the provisions of the Act of 1871 on the present Union Pacific Company, and have not discussed the effect of the terms of the contract between the City of Omaha and the old company on the present company. We do not deem it necessary to discuss the question of the effect of that contract on the new company, but we contend that in the same way the new company would not be bound by the provisions of said contract, even if they could be enforced against the old Union Pacific Company. We contend that that was a personal contract between the City of Omaha and the old Union Pacific Company, in nowise binding on the purchasers of property at foreclosure sale under a mortgage made long prior to the execution of said contract, and that the new company took all the property of the old company free and clear of any liens, burdens and easements placed thereon by the old company subsequent to the date of the recording of the mortgage, and that even if the old company could have been forced to permit appellee to use its bridge, the new company cannot.

In passing upon this branch of the case, the Circuit Court of Appeals bases its holding against our contention on the argument that the original Acts of 1862 and 1864 gave Congress the right to alter, amend or repeal the acts. But the Court seemed to have over-

looked the provision that this could only be done, "*having due regard for the rights of the parties.*"

The first mortgage was made, relying upon conditions as they then existed. Imposing obligations such as appellee is contending for certainly impairs the rights of the mortgagees, otherwise the present Pacific Company, who succeeded by purchase at the foreclosure sale to their rights, would not be contesting these claims so strenuously in the courts. The Circuit Court of Appeals holds that so long as the Pacific Company is not deprived of the use of its bridge by this *duty* to permit other railway companies to enjoy the joint use of the bridge no vested rights of the mortgage bondholders are impaired.

See Opinion, Record Pleadings, page 288.

To have the right to say to one company it might use the bridge and to another that it cannot, but must transfer its freight and passengers at Council Bluffs, is not that a valuable right which this holding impairs? Is not a clear right and title, impaired by any duties or obligations, a valuable right and title? This is what the first Pacific Company had. This is what the first Pacific Company mortgaged.

Does not the imposition of this Company upon the Pacific Company impair that right? It seems to us to be so unquestionable as to be beyond argument. The Circuit Court of Appeals undoubtedly lost sight of the fact that no change could be made which interferes with vested rights.

FOURTH POINT.

The Mason City & Fort Dodge Railroad Company was not entitled to use and occupy any of the premises of the appellant the Union Pacific Railroad Company upon the terms of any of the contracts between that Company and other railroads.

The lower court in its decree gave to the appellee the same rights which the Pacific Company had granted by contract to the Rock Island and Milwaukee companies. This was manifestly error and without any possible authority under the statutes relied on by appellee.

An examination of the Rock Island contract and the decree will show this Court that the decree was taken bodily from the contract with certain additions thereto, which were suggested by a contract entered into between the Pacific Company and the Northwestern Company.

Below will be found the important provisions of the decree and contract, placed side by side in parallel columns for the purpose of examination and comparison:

ROCK ISLAND CONTRACT.	DECREE.
"the full, equal, joint possession and use of its main and passing tracks now located and established, or which may hereafter be located and established, between the terminus of said tracks in the City of Council Bluffs, in the State of Iowa, to a line drawn at a right angle across said tracks, within one and one-half (1½) miles southerly	"the full, equal and joint use of the main and passing tracks of the Union Pacific Railroad Company, now located and established, or which may hereafter be located and established, from the eastern terminus of said tracks in Council Bluffs, in the State of Iowa, to a connection with the Union Stock Yards railroad and the other rail-

of its passenger station at South Omaha, in the State of Nebraska, including the bridge over which said tracks extend across the Missouri River between the City of Council Bluffs and Omaha;

roads connecting with the Union Pacific Railroad at South Omaha, in the State of Nebraska, including the bridge over said tracks extend across the Missouri between the cities of Council Bluffs, Iowa, and Omaha, Nebraska;

connection with the Union Depot tracks in Omaha;

also the connection with, and the tracks pertaining thereto, of the general passenger station of the said Union Pacific Railroad in Omaha, and said passenger station, and all tracks and facilities connected therewith;

the side or spur track leading from its main track to the lower grade of the Pacific Company's sidings and spur tracks in Omaha, and such extensions as may be hereafter made;

also a connection with the side or spur track leading from the main line to the lower grade of the sidings and spur tracks in Omaha, and such extensions as may be hereafter made;

and side tracks in Omaha on which to receive from and deliver to the party of the second part [Rock Island Company], freight that may be handled through the warehouses or switched by the party of the first part [Pacific Company];

also a connection with the side tracks in Omaha on which to receive from and deliver to said Union Pacific Railroad Company freight which may be handled through the warehouses, or may be switched by the said Union Pacific Railroad Company;

the connections with the Union Stock Yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the party of the first part [Rock Island Company] may construct, maintain and exclusively use a track or tracks, aggregating three thousand feet in length, for the storage of cars and other purposes;

also the connections with the Union Stock Yards tracks in South Omaha, and with the tracks of all other railway companies, which now or may hereafter connect at or near South Omaha with the tracks of the Union Pacific Railroad Company hereinbefore described, each and all, to the same extent and upon the same terms and conditions stated in the contracts between the Union Pacific Railroad Company, and C. & N. W. Ry. Co., C. M. & St. P. Ry. Co., and C. R. I. & P. Ry. Co. as appears by the contracts in evidence in this case, and the depot contract, and the supplemental contract between the same parties, being Exhibits Nos. 6 and 7, attached to the bill of complaint herein, without preference or discrimination.

That the Mason City & Fort Dodge Railroad Company is entitled to connect its tracks with the said tracks of the Union Pacific Railroad Company at the point in Council Bluffs, and in the manner shown upon the Complainant's Exhibit No. 4d, and forever maintain and operate the same.

The Rock Island Company shall have the right to make such connections between its own tracks and the leased tracks of the Pacific Company as shall be necessary or convenient in the operation of its own line or lines in connection with such leased tracks; or to the conduct of its business as a common carrier.

That the Mason City & Fort Dodge Railroad Company is entitled to make such connections between tracks which it now owns or may hereafter acquire, and the tracks hereinbefore described of the Union Pacific Railroad Company as shall be necessary or convenient in the operation of its own line, or as may be necessary or convenient in its business as a common carrier, and forever maintain and operate such connection (Record, p. 261).

Appellee bases its right to relief upon the Act of 1871, as construed by this Court in the Rock Island case.

Turning to that case, what do we find it holds under the act in question? "The determination of the existence of the power to grant *running rights.*"

> "The Pacific Railroad Acts * * * imposed * * * the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included."

The opinion holds that the right to use the bridge would include the right to use the approaches thereto, the tracks to the depot (which tracks would include only such tracks as connect the bridge with the depot), the depot itself, and the tracks connecting the depot

with South Omaha. That is all. We have hereinbefore discussed appellee's right to go to South Omaha, and so will pass that in the present discussion. Giving appellee everything the Supreme Court in the Rock Island case held the Rock Island Company entitled to under the Pacific Railroad Acts, then appellee would be entitled to have "the use of the bridge, the approaches, tracks, depots and other facilities for the public accommodation." (Opinion, p. 588.)

It is further stated in said opinion:

> "A railroad bridge can be of no use to the public unless united with necessary appurtenances" (p. 588).

This depends entirely upon what is to be included in the words "necessary appurtenances." The Supreme Court, referring to the words "necessary appurtenances," has held that this includes "approaches, tracks, depots and other facilities for the public accomodation." We earnestly deny this proposition. Railroad bridges are often used by carriers, who are not the owners thereof, for the purpose of crossing rivers and making connections merely, and the bridges can be and are of use to the public when only the bridges themselves and the approaches thereto are used by said carriers, and without the use of depots and other facilities. It does not necessarily follow that such carriers are entitled to depot and other facilities either connected with or distant from the bridge. It is common knowledge that a number of railroad bridges in this country are used by other railroad companies than the owners, which other railroad

companies do not ask for nor receive any depot or other facilities in connection therewith.

Taking this very bridge in question, the Burlington road uses the bridge proper and its approaches, but has no connection whatever with the Union Pacific tracks, or depots either in Council Bluffs or Omaha, or other facilities. The Burlington Company has a depot of its own in Omaha, and it is clear that the use of the Union Pacific depot there is not at all necessary or appurtenant to its (the Burlington Company's) use of the bridge.

But the opinion says the Act refers to "the tracks and depots required to perfect the same." That must mean the bridge, and cannot possibly refer to the Omaha and South Omaha depots and the tracks necessary to perfect these depots. It was not found necessary to erect any depots to perfect the bridge, nor have any ever been erected. But granting to appellee everything that the Rock Island case gives to it, placing any strained construction possible on the language above quoted, where does the Court find authority to give to appellee the "full, equal and joint use of the main and passing tracks of the Union Pacific Road"? Why should appellee have the full and equal use with the Pacific Company of the main tracks, and why should it have any use of the passing tracks? And the decree gives appellee not only such tracks as the Pacific Company now has, but all which it may hereafter locate or establish between the eastern terminus of its tracks in Council Bluffs to a connection with the Union Stock Yards Railroad in South Omaha, and all the other

railroads connecting with the Union Pacific at South Omaha. The decree gives appellee so much that the bridge becomes merely an incident, and almost overlooked, but is finally tacked on in the following language, "including the bridge."

The decree makes the bridge nothing but an appurtenance to connection with South Omaha. Under what theory is the Pacific Company required to connect appellee's tracks with the tracks of all the other railroads in South Omaha? Will the Court hold that this obligation is an "appurtenance" to a bridge miles away?

The court in its decree lost sight of the bridge entirely, as well as any construction of the Pacific Bridge Acts, because it had in mind always the Rock Island contract, which granted "connections with the Union Depot tracks in Omaha." The decree even goes far beyond the contract, for it provides (Record, p. 261),

> "also the connection with, and the tracks pertaining thereto, of the general passenger station of the said Union Pacific railroad in Omaha, and said passenger station, and all tracks and facilities connected therewith."

Then the decree, taking up the text of the contract and almost in the identical words thereof, provides (Record, p. 262),

> "Also a connection with the side or spur track leading from the main line to the lower grade of the sidings and spur tracks in Omaha, and such extensions as may be hereafter made; also a connection with the side tracks in Omaha on which to receive from and deliver to said Union Pacific Rail-

road Company freight which may be handled through the warehouses, or may be switched by the said Union Pacific Railroad Company."

The decree then takes up the situation at South Omaha and by a broad sweeping provision incorporates by reference all the contracts the Pacific Company has ever made with other companies, and finally, still using the Rock Island contract as a model, copies the final provision therein almost word for word in the following language:

> "That the Mason City & Fort Dodge Railroad Company is entitled to make such connections between tracks which it now owns or may hereafter acquire, and the tracks hereinbefore described of the Union Pacific Railroad Company, as shall be necessary or convenient in the operation of its own line, or as may be necessary or convenient in its business as a common carrier, and forever maintain and operate such connection."

What will be the effect of all this? The answer is, that undoubtedly the Mason City Company, with this decree, will be able to make and enforce demands upon the Pacific Company which other railroad companies, under their contracts, could not possibly demand. For illustration, the Pacific Company might have a track running alongside of business houses and industrial concerns; under the decree the Mason City Company could build a track of its own between such concerns and the Pacific Company's track, and thus absolutely prevent it from conducting any operations or business with such concerns, and yet compel it to connect said

Mason City Company's track with the Pacific Company's track at either end.

If the Pacific Company builds a track to any part of the business district of Omaha, no matter at what cost and expense, that moment the Mason City Company demands connection with such track and proceeds to gather in the business by its historic methods. The duty of a court of equity is to protect vested rights, not destroy them; to stand as a shield against injustice which the courts of law cannot prevent. Instead of this, it is taking away from the appellant its right of contract and imposing burdens upon it which no board of directors, having in mind the best interest of their company, would dream of undertaking. The decree should have been drawn with due regard to the law of the case and not fashioned after an improvident contract which the predecessor of this company had entered into, and which this company was obliged to assume and carry out.

FIFTH POINT.

No necessity existed for the use by the Mason City & Fort Dodge Railroad Company of the bridge across the Missouri River, and there was therefore no equity in its bill of complaint.

Since the building of the Union Pacific bridge conditions have changed very materially. The difficulty of getting across the Missouri River experienced by railroads terminating upon the eastern bank thereof and all such matters which were of great concern in the early 70's have been entirely obviated.

There are now in existence and in operation, connecting with the great trunk lines from the east, traversing the State of Iowa and crossing the Missouri River at or near Omaha, the following lines:

The Chicago, Milwaukee & St. Paul Railway, the Chicago, Burlington & Quincy Railroad, the Wabash Railroad, the Chicago, Rock Island & Pacific Railway, the Chicago & Northwestern Railway and the Illinois Central Railway.

Bridges span the Missouri from its junction with the Mississippi to its source, and between Council Bluffs and Omaha already three great bridges have been constructed and others are in contemplation. Two of these are intended for railroad travel—the Union Pacific and the Omaha Bridge & Terminal Company's bridge. Appellee does not have to depend upon the Union Pacific bridge or the building of a bridge itself to have free and perfect access to Omaha and South Omaha. The Omaha Bridge & Terminal Railway Company's bridge was built especially for the purpose of accom-

modating such railroads as appellee's. Appellee can cross the river and get into Omaha over that bridge just as conveniently as it can by means of the Union Pacific bridge. The crossing over the Terminal bridge presents no difficulties, for before appellee conceived the idea of compelling the Union Pacific to make an unwelcome contract, appellee had entered into negotiations with the Bridge and Terminal Company, had prepared maps and specifications showing connections, and had almost come to an agreement with that company for its entrance into Omaha. And the arrangement would have been a very appropriate one. That bridge is not used by many great trunk lines as is the Union Pacific and is not burdened with the enormous traffic which the Union Pacific bridge bears, in fact but a very small part of its capacity is used. There is no equity in the demand of appellee that it be allowed to come into Omaha over the Union Pacific bridge.

Mr. Samuel C. Stickney, General Manager of the Mason City and Fort Dodge Railroad Company, testified upon cross-examination (Record, Evidence, Vol. I., pp. 374–382) that the appellee had received a written proposition from the management of the Omaha Bridge and Terminal Company to take its trains from Council Bluffs, Iowa, across the bridge of the said Bridge and Terminal Company, and through to South Omaha; that said bridge company was prepared to make the necessary connections which would give the appellant practically all that could be accomplished by going over appellee's bridge and tracks, except that the latter way would be more convenient and satisfactory than the former. Mr.

Stickney also testified that that proposition had never been accepted nor rejected, and that if it had been accepted, they could have made arrangements with the bridge company to take their trains to South Omaha. This would give the appellee the same connections as are now enjoyed by the Illinois Central Railroad Company.

This testimony was not denied. It shows clearly that the appellee could make every point by connection with the Omaha Bridge and Terminal Company that it expects to make by trying to force itself upon the appellant against the latter's wishes.

How appellee can come into a court of equity and ask that the court shall force its unwelcome presence upon an objecting road, when all its objects and purposes can be accomplished by the use of an adjoining bridge, is beyond our powers of comprehension. If it had a bare, naked, legal right to cross this bridge, we would have nothing to say, but appellee, by coming into equity admits that the law gives to it no such right, and it attempts to force itself upon the appellant under the cloak of equity. It should take the willing way open to it rather than force an unwilling entrance into Omaha by means of a court of equity.

Take the Joy case, for instance, upon which counsel strongly relied in the lower court. In that case questions concerning a public park were involved. To preserve the rights and protect the interests of the public, the park must be preserved as a whole, and not cut up by innumerable tracks of railways desiring entrance into a great city. A railroad company is granted a right of way

through the park, under the agreement that all other roads desiring to enter the city may use such right of way and thus save other tracks through the park. A railroad seeks entrance and the owners of the right of way attempt to prevent it from entering. Its only other practical recourse is to condemn a way through this public park. There is no adjacent line paralleling this right of way over which the new company could just as conveniently run its trains. It must either use the original right of way or cut a new way through the park. Hence, it could consistently come into a court of equity and ask for an order allowing it to run over the only available right of way. Even though there was not in this case another company ready and willing to provide complainant with an entrance into Omaha, still the claims of the appellee in this case to the consideration of a court of equity would not compare with those of the complainant in the Joy case, since here another bridge could be built. The only objection on the part of the appellee to this is the expense, and equity will not force one company into a distasteful contract simply to save expense to another, at any rate when no great public interests are involved. Hence, we think that every argument which is used in the Joy case from an equitable standpoint to compel the use of the right of way, is an argument in favor of the defendant in this case and against the claim of appellee seeking to inflict itself upon defendant.

Suppose that in the Joy case the evidence had shown that there was a second right of way through the park and to the Union Depot, owned by another railroad com-

pany, and said company was ready and willing to allow the Colorado company to use such right of way under the same terms on which it was endeavoring to use the Wabash right of way, would it be thought for a moment that any court of equity would have enforced specific performance of the agreement on the part of the Wabash company, when the complainant and the public would have been equally as well served by refusing the relief asked, and relegating the Colorado company to the use of the other right of way?

What reason has appellee offered for invoking these equitable powers? Its object can be accomplished in two ways, one by using the Terminal bridge, which is open to it, and the other by using the Union Pacific bridge, which is closed. It comes here and asks this Court to exercise its extraordinary equitable powers in its behalf for what purpose? To command the Union Pacific Company to throw open its closed bridge. What reason does it give for asking the exercise of this extraordinary power, and for not taking the way open to it? The answer must be, simply, because it *prefers* the closed way. This is not a reason which will commend itself to a court of equity. The mere exercise of an arbitrary preference does not appeal to the conscience of a Chancellor. Equity only interposes as a last resort and to prevent disastrous and irreparable injury. We confidently submit that no such case has been made out by appellee here.

We think none of the cases relied on by counsel on this point are parallel with the case at bar.

The case of *Chicago, R. I. & P. Ry. Co. vs. Union*

Pacific Ry. Co., 47 Fed., 15, is clearly distinguishable. We quote from Judge BREWER'S opinion (p. 26):

> "But this is outside of the question before us. Returning to the case: Counsel contend that it is distinguishable from that of Joy vs. St. Louis, in that there was a great public interest to be protected which justified, as was mentioned in the opinion, the interposition of a court of equity. I think no such distinction exists. There is in this case a public interest as significant and deserving of protection. The testimony discloses that before this contract was entered into, the Rock Island had determined to build a bridge across the Missouri River at Omaha, and fill the Gap between Council Bluffs and Beatrice by its own line.
>
> "In conjunction with the Chicago, Milwaukee and St. Paul Railway Company, it had obtained from Congress a charter for the building of the bridge; and negotiations were pending to secure the capital, some two or three millions of dollars, with which to do the work. At that time *the officers of the Pacific sought the officers of the Rock Island and the St. Paul, and prevented the building of the new bridge by means of this contract.* If this contract had not been made, or it should not now be enforced, *two or three millions, at least, of additional capital, would be put into railroad and bridge construction;* and such an expenditure of money places an additional burden upon the public. * * * So, here, if the public can *prevent an increase* of railroad property *by the sum of two or three millions of dollars*, it saves to itself the burden which that additional expense would cast upon it. Further, a new line running into Omaha cuts up and destroys un-

necessarily a large amount of property. So in this, as in the case of Joy vs. St. Louis, there is a public interest at stake which justifies the intervention of a court of equity."

In the above case, as therein stated, the facts were that the Milwaukee and Rock Island roads were preparing to build a new bridge for themselves when the Union Pacific Company voluntarily went to them and prevented them from building by making the contract to use its bridge. At that time the Union Pacific bridge was the only one available for railroads at that point. The Terminal Company's bridge was not in existence. The Rock Island and Milwaukee companies had been prevented by the action of the Union Pacific from building their own bridge, and then were shut out by it from using the only available bridge which it had contracted to allow them to use. Certainly from an equitable standpoint this case is not parallel with the case at bar.

The case of *Chicago, etc., Ry. Co. vs. Kansas C., St. J. & C. B. Ry. Co.*, 38 Fed., 58, cited by appellee below, is not in point. In that case Judge BREWER refused to grant an injunction, and the question of specific performance was not discussed. However, in any event, the case is clearly distinguishable from the case at bar. The defendant company had agreed with the City of St. Joseph that in consideration of being permitted to lay down its tracks on certain streets in said city, it would permit other roads to use said tracks. This is very similar in principle to the Joy case. Of course the object of the city was to set apart certain of the streets for railroad use, and not permit the other streets to be

so used, in the same way as the Park Commissioners in the Joy case desired only one right of way through the park, to be used by all roads. The same line of reasoning which makes the Joy case distinguishable from the case at bar will also make this case distinguishable. There were no other streets which could be used, and the new railroad company had to use the streets occupied by the defendant company, or none. In the case at bar there is a choice of bridges. If refused the use of one, still the other remains open.

The cases of *Canada Northern Ry. Co. vs. International Bridge Co.*, 7 Fed., 653, and *Canada Southern Ry. Co. vs. the same* defendant, 8 Fed., 190, cited by appellee in the court below, have not the slightest bearing on the point under discussion. The sole question in those cases was as to whether Congress intended to give the United States Court for the Northern District of New York power to fix the compensation to be paid by companies desiring to use the Niagara Bridge, and the Court held that such was not the intention. The question of specific performance of a contract or duty was not discussed or even hinted at. Moreover, the bridge in question was the only one which could be used by railway companies at the point where it was erected.

Appellant is here earnestly resisting the invasion of its property rights. It pleads for the right of contract and the freedom of contract. These important rights, guaranteed to it as to all persons under our institutions, should not be taken from it unless the reasons are strong, the necessities great and the authority clear.

SIXTH POINT.

The Mason City & Fort Dodge Railroad Company had no corporate power under its charter to acquire any right, title or interest in the property of the appellant in the State of Nebraska.

Appellee is a corporation organized under the laws of the State of Iowa. Its articles of incorporation and amendments thereto are found upon pages 149–166 of the Record, Evidence, Vol. I. By Article II., of the original articles of incorporation, it was stated that (Record, p. 151):

ARTICLE II.

"The object of said corporation is to construct, maintain, and operate a railroad between the cities of Mason City, in the County of Cerro Gordo and Fort Dodge, in the County of Webster, in the State of Iowa, with such lateral branches and such extensions beyond each and every of said points as the board of directors of said corporation may determine upon and designate, and the law permit."

Thereafter the articles were amended, and Article II. was amended so as to read as follows (Record, p. 164):

ARTICE II. (As amended.)

"The object of said corporation is to construct, maintain, and operate a railroad extending from Mason City, in the County of Cerro Gordo, in the State of Iowa, to Fort Dodge, in the County of Webster, in said State, thence to Lehigh in said County of Webster, and thence from a point on its line at or near Lehigh in a southwesterly direction

to the City of Council Bluffs, in the County of Pottawattamie, in said State of Iowa; with such lateral branches from any point on its said line, and such extensions beyond each and every of said points, as the board of directors of said corporation may determine upon and designate and the law permit."

It will be seen that there was an express limitation in the articles of incorporation to the construction of a railroad between Mason City, Fort Dodge, Lehigh, and Council Bluffs, all in Iowa. Power was given to build lateral branches or extend the line beyond these points *as the Board of Directors might determine upon and designate.*

No other action was taken by the Board of Directors, and no action has been taken by the corporation authorizing lateral branches or extending the line beyond the points designated in the Articles.

We think it would be a work of supererogation to cite authorities in support of the fundamental propositions that corporations have no other powers than such as are specifically granted or such as are necessary to carry into effect the powers expressly granted; that corporations can make no contracts or do no acts, either within or without the State which has created them, except such as have been expressly authorized, and only in the manner in which they have been authorized; and that they can only make such contracts as the Legislature may authorize them to make. Under the comity of a State, permission cannot be given to a railroad company to go beyond its charter.

It is true that appellee has filed its Articles in the State of Nebraska, and conformed to the laws thereof. This proceeding, however, does not give to it any other or greater powers than are found in its charter. The State to which appellee owes its existence and within whose dominion it belongs, has legally empowered it only to build the lines specified in its charter. The State of Nebraska cannot concede permission to appellee to go beyond its charter rights, privileges and powers.

> "A railroad cannot contract to extend its lines beyond the limits defined in its charter, nor construct branch roads not authorized by its charter, nor make any material change in its route where the charter prescribes what the route shall be."
>
> *II. Elliott on Railroads*, Sec. 374, p. 512, and cases cited.

It is claimed by appellee that by Section 2038 of the Code of Iowa of 1897, power was conferred upon it to construct or extend its line into the State of Nebraska. Under this section there is no doubt that if appellee had taken the proper corporate action enlarging the scope of its powers or declaring that it would or intended to extend its line from the State of Iowa into another State, it would be permitted to do so under the provisions of this section. But the articles of incorporation of appellee show that for some reason best known to itself, it has limited, defined and confined the line of railway that it is to construct, and it has expressly stated in Article II., quoted above, that there can be no extension beyond the points therein designated without the

action of the Board of Directors, who are to determine and designate the extension. No such action has been taken.

The Court of Appeals held that the resolution of Aug. 28, 1902, authorizing and directing the officers of the Company to negotiate for, to demand and to enforce by this or other suits its demand for the use of the bridge, etc., was a complete compliance with the requirements of the charter. We cannot agree with this finding. Article II. provides that the Company may extend as the Board of Directors of said corporation *may determine upon and designate* and the law permit.

How can it be held that a mere notice to the Union Pacific, as is this resolution referred to in the opinion and found in the Record Evidence at page 577 and following, is a solemn corporate declaration that the company intends to extend its line into Nebraska and to South Omaha. Not even in the notice do they recite that such an extension has been determined upon, but the notice simply demands to be admitted into full, equal and joint possession, etc.

Suppose the demand had covered the entire line of the Union Pacific? Would this Court hold that the company had, by formal corporate resolution, determined to extend its line to San Francisco? Who would think of looking into a demand on the Union Pacific Railway to determine the extent of the corporate powers of the Mason City Company? But this is what must be done if the holding of the Court below is sustained.

SEVENTH POINT.

The Mason City & Fort Dodge Railroad Company was not entitled to avail itself of the conditions found in the Alvin Saunders deed.

The property described in the Alvin Saunders Deed, which is set out in the bill of complaint, beginning on page 20 thereof, is a portion of the property involved in this controversy. Upon parts of the property thus conveyed are now located and situated certain of the tracks, side tracks and depots referred to in the bill of complaint, which appellee seeks to use. All of the property conveyed by the Saunder's Deed was sold with the other property at the foreclosure proceedings and appellant became the owner thereof, as the purchaser at said sale.

This deed purports to have been executed on January 20, 1872, as an indenture, with Alvin Saunders, trustee of the City of Omaha, as party of the first part, and Union Pacific Railroad Company as party of the second part, with a lengthy preamble reciting the title of Saunders, trustee, and a direction by the City Council of the City of Omaha to him to make, as such trustee, a conveyance to the railroad company of the property in said instrument described, subject to the terms, conditions and restriction of said contract, quoting the same and recites the consideration to be "of the premises and of the sum of one Dollar," and "grants, sells and conveys unto the said party of the second part, and to its successors," the real estate described.

There is no formal *habendum* clause. That is to say, the words "to have and to hold to said party of the second part its successors and assigns," etc., are absent.

In Washburn on Real Property (Sixth Ed.), Secs. 2357, 2358, it is said (pp. 420, 421):

> "It is [the *habendum*] not an essential part of a deed. * * * If the granting part of a deed contain proper words of limitation, the *habendum* may be dispensed with altogether; and of so little importance is it deemed, compared with the words of the grant, that, if the *habendum* is clearly repugnant to the grant, it is treated as of no validity or effect."
>
> "An *habendum* may, therefore, be regarded as the clause following the granting part of the premises in a deed which defines the extent of ownership in the thing granted, to be held and enjoyed by the grantee, and can, therefore, be applied to use only when the granting words leave the subject of such ownership open to explanation." * * *

The granting part of this conveyance is in form absolute. There is nothing in the granting part of the instrument in any way limiting the grant. It appears that the only authority of this trustee to make this deed is a resolution of the City Council of the City of Omaha, which is referred to in the preamble of the instrument, and which directs him to make, execute and cause to be delivered a deed, subject to the terms, conditions and restrictions of said contract.

The words of explanation put in the place of the *habendum* clause are the words which, at the time, were probably meant to bring the conveyance as made within the terms of the resolution under which the trustee acted, which words classify themselves into three propositions, as follows (Record, p. 29):

1. "Hereby limiting the use of all said premises to the legitimate purposes of [*a*] depot and transfer grounds; [*b*] and grounds for right of way and approaches to the said Missouri River Bridge."

2. "Subject to the conditions and restrictions contained in the contract above recited."

3. The imposition of a condition as follows: "Provided, further, that in case said premises, or any part thereof, be abandoned or disused or converted to any other than the uses and purposes hereinbefore limited, then the same shall revert to and become the property of the said City of Omaha."

It will be noticed that, strictly speaking, the so-called *habendum* clause makes a limitation of the uses to which the property may be applied. This clause seeks to impress the premises conveyed with a certain particular use, and to limit the nature and kind of business which the grantee company might permit thereon, but the property was conveyed subject to the conditions and restrictions contained in the contract recited in the deed, with a proviso, that in case of abandonment or disuse, or if converted to any other use, the same should revert to and become the property of the City of Omaha. Whether this be a limitation or a condition subsequent, it is certain that the estate passed in fee simple to the Union Pacific Railroad Company, and is a base or determinable fee.

In form and in substance, the deed creates a limitation, because the grantor conveys the property to the grantee subject to the conditional limitation inserted in the deed with a grant over to the City of Omaha. This

is subject to the following proviso: If Alvin Saunders, trustee, shall be considered in law and in equity as the City of Omaha, or if in law and equity the City of Omaha is treated as the real grantor, notwithstanding the office filled in the instrument by Alvin Saunders, the dry and naked trustee, then the instrument can only be construed to be a deed upon condition subsequent. The title passes, and there is no real limitation over, because the reservation of the right to re-enter and the reverter clause are in favor of the grantor.

COVENANT.

That the railroad company would use the property for the purposes specified in the contract does not amount to a covenant. There are no words of promise by the grantee. The words of grant import, not a covenant to use, but either a conditional limitation or a condition subsequent, so that upon failure to use the grounds and to comply with the contract, the estate might be avoided and the City of Omaha again become the owner of the property. If the real grantor in said instrument is the City of Omaha, there is then in the instrument *no limitation over to a person other than the grantor*, and the estate is liable to be defeated only by re-entry by the City of Omaha, and this right of re-entry cannot be assigned or conveyed by the City of Omaha. This right of re-entry is not an estate in the land. The words used in the reverter clause are appropriate, although unnecessary, for the grantor to reserve to himself the right of re-entry.

It is provided in the Alvin Saunders Deed, after

setting out the conditions under which the property covered thereby is granted to the railroad company:

> "In case said premises or any part thereof be abandoned or disused or converted to any other than the uses and purposes hereinbefore limited, then the same shall revert to and become the property of the said City of Omaha."

These words are those of condition rather than of limitation. Words of limitation in a deed determine the estate upon the happening of the event itself without the necessity of anything being done to regain the estate, while words of condition such as are found in the Saunders deed do not have any effect upon the title to the property itself, unless the party interested in the condition moved in the matter and thereby became reinvested with the estate which has been granted away.

So long as the City of Omaha is satisfied with the use of the property made by the railroad company, no one else has any right to complain, and although the conditions may have been broken by it, its right to occupy the property and its title thereto might run on indefinitely.

The principle of law as above set forth is laid down in an unbroken line of decisions from the earliest text writers, through a long list of adjudicated cases, and an examination of the cases referred to below will establish this principle beyond controversion.

Delvin on Deeds, Sec. 974, is as follows:

> "A limitation determines an estate upon the happening of the event itself, without the necessity

of doing any act to regain the estate. 'The distinction between an estate upon condition and a limitation by which an estate is determined upon the happening of some event, is, that in the latter case the estate reverts to the grantor, or passes to the person to whom it is granted by limitation over, upon the mere happening of the event upon which it is limited, without any entry or other act; while in the former, the reservation can only be made to the grantor or his heirs, and an entry upon breach of the condition is requisite to revest the estate. The provision for re-entry is, therefore, the distinctive characteristic of an estate upon condition; and when it is found that by any form or expression the grantor has reserved the right, upon the happening of any event, to re-enter, and thereby revest in himself his former estate, it may be construed as such, where a condition subsequent is followed by a limitation over in case of the breach of a condition, it becomes a conditional limitation. No one but a grantor or his heirs can take advantage of a breach of a condition. But a stranger may take advantage of a limitation."

See, also, *Attorney General vs. Merrimack Mfg. Co.*, 14 Gray, 586.

In the case of Osgood vs. Abbott, 58 Maine, 73, it was held that a deed to the proprietors of the South Chapel in Frilburg was made "in consideration of having a meeting house erected and continued on the lot of land heretofore described," stipulated that "this lot being given for a meeting house lot, is to revert to me, unless it should be improved for that purpose" with *habendum* clause "to said proprietors and their succes-

sors forever, provided it be improved for that purpose." The grantee was not an incorporated society. The Court held that the grantor and his heirs were estopped to deny the existence of the grantee; that the deed conveyed an estate upon condition subsequent; that the estate continued in the grantee until defeated by actual entry made for the purpose of defeating it by some one having the right to claim for such forfeiture. HERE WAS NO CONDITIONAL LIMITATION OF THE ESTATE GRANTED. The language of the conveyance is not such as to carry an estate only *durante dum donec quosque tamdiu*, which would terminate by breach of the condition *ipso facto*. This apparently was an estate in freehold, defeasible by a breach of the condition, if the parties entitled to require the performance of the condition chose to enforce it.

That the entry might be made after breach of the condition by the grantor or his heirs, and it was unnecessary to stipulate for a right of re-entry for such breach of condition.

In the case of Stearns vs. Godfrey, 16 Maine, 158, it was held:

> "If a condition subsequent be followed by a limitation over, in case the condition is not complied with, or there is a breach of it, it is termed a conditional limitation, and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited. Where the Commonwealth of Massachusetts granted a tract of land to B. and F. by name, and

to certain settlers named only in the *habendum*, each settler to have a 100-acre lot, including his improvement on which he lived, of land, etc., 'on condition that each of the grantees aforesaid, pay to said B. & F. five pounds in lawful money within one year from this time, with interest till paid,' followed by these words: 'Provided, nevertheless, if any settler or other grantee aforesaid shall neglect to pay his proportion of the sum or sums aforesaid to be by him paid in order to entitle him to 100 acres as aforesaid, in that case the said B. & F. shall be entitled to hold the same in fee, which such negligent person might have held by complying with the condition aforesaid on his part.' The title of any settler who failed to perform the condition within the year, vested in fee in B. & F. and was out of the reach of legislature control" (Syllabus).

In the case of Voris vs. Renshaw, 49 Ill., 425, it was held that a conveyance by George Morton to his son, in consideration of one dollar, and natural love and affection, but with the following *habendum:* "to have and to hold the premises, with the appurtenances, unto the said party of the second part, and his heirs and assigns forever, upon the express condition, however, that the party of the second part shall not convey the above described property, except by lease for a term of years, to any person whomsoever, prior to the first day of January, 1861," held, that where the grantee, within the limited period, executed to a party a lease of the premises for ninety-nine years, and also at the same time gave him a bond for a conveyance of the property

in fee after the expiration of the limitation, and received from the purchaser the purchase price thereof, these acts did not work a forfeiture of the estate.

In the case of Henderson vs. Hunter, 59 Pa., 335, it was held:

> "A lot was granted to trustees naming them, and to their successors in trust, for the uses, etc., thereinafter mentioned, to 'hold to said trustees and their successors in office forever in trust,' to build a house of worship for the members of the Methodist Church, 'so long as they use it and no longer, and then to return back to the original owner' according to the rules and discipline from time to time adopted by the general conference held, that the estate in the trustees terminated when the house ceased to be used as a place of worship according to the discipline of the church" (Syllabus).

In People of Vt. vs. Society, etc., 2 Paine [U.S.C.C.], it was held that no person can take advantage of a condition broken, except the grantor and those claiming by descent. The grantor, although a state government, may be estopped, as others, but no grantee, or assignee of the reversion can take advantage of a re-entry by force of condition broken.

In the case of *Southard vs. Central R. R.*, 26 N. J. L., 13, 17, it was said:

> "The condition of the grant, upon the breach of which a forfeiture is claimed to have occurred, is as follows: 'If at any time forever hereafter, the said company shall cease to use and occupy the above described lands and premises for the sole and only purpose of a depot or other place for the reception

and discharge of passengers, produce, goods, wares and merchandise or shall establish, make, have, use, enjoy or possess any other depot or other place for the above described purposes, within one mile of the said lots and premises hereby granted and conveyed, or shall at any time forever hereafter build or erect, or cause or permit to be builded or erected by any other person or persons, upon said premises, any public house, inn or tavern, store, or other house or houses, other than for storing of produce, grain, goods, wares and merchandise, or any other house of any kind or use soever, other than may be necessary to and for the said company or parties of the second part, for their own and sole use and accommodation as aforesaid, that then and in that case the right and title hereby conveyed shall cease, and the said parties of the second part shall forfeit all the right, title and interest conveyed.' * * *

"It is not insisted, nor can it be, that the condition is violated by a transfer of the rights and property of the grantees under legislative sanction to another corporation. But it is insisted that the condition is violated first by extending the railroad to a point beyond Somerville, whereas the design of and effect the condition is to make that point the terminus of the road. There is no such limitation expressed in the grant. * * * If such was the intention of the parties, it was the most important provision in the whole condition of the grant, and it is remarkable that no direct allusion should be made to it. It is reasonable to expect that so important a restriction would have been expressed in clear and unequivocal terms, and not left to conjecture and inference. It is said that by extending the road, the company used the land conveyed for

the purposes of transit, whereas by the terms of the grant they are restricted to use it for the sole and only purpose of a depot."

There is no discussion in this case as to liability under the condition as thus construed, but the above language is important in considering the main purpose of the contract as quoted in appellee's bill.

In Fifty Associates vs. Howland, 52 Mass., 99, it was held:

> "A lease for five years contained this clause: 'Provided, always, and these presents are upon this condition, that if the lessees, or his representatives, shall neglect or fail to perform and observe any or either covenant, * * * then the lessor lawfully may immediately, or at any time thereafter, and whilst such neglect or default continues, and without further demand or notice, enter into and upon the said premises, repossess the same as of his former estate, and expel the lessee.' The lessee failed to pay rent according to his covenant and the lessor entered for condition broken; held, that this clause in the lease was a condition, and not a conditional limitation; that the lessee's estate was not determined by his failure to pay rent, but by the lessor's entry, if that entry was legally made" (Syllabus).

In the case of *Wheeler vs. Walker*, 2 Conn., 196, it was held that although the rules applicable to the construction of a devise may be entirely different from those pertaining to the construction of conveyances in the particular case under consideration, they seem to be the same. A devisor gave to his sons D. and M. all

the rest and residue of his estate, real and personal, they paying to his two daughters P. and A. each three thousand dollars within one year after his decease. The money was not paid to one of the daughters at any time. She entered upon the estate for non-payment and brought ejectment for possession of her one-fourth. It was held that the devise was conditional devise.

Blackstone states the same in the following words (Blackstone, 2 Ch., 10, p. 165):

> "A distinction is, however, made between a condition in deed and a limitation, which Littleton denominates also a condition in law. For when an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation; as when land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made 500 pounds, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500 pounds), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be voided upon the payment of forty pounds by the grantor, or so that the grantee continues unmarried or provided he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens unless the grantor

or his heirs or assigns take advantage of the breach of the condition and make either an entry or a claim in order to avoid the estate. But, though strict words of condition be used in the creation of the estate, yet if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a condition; because if it were a condition, then upon the breach thereof only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but when it is a limitation the estate of B determines and that of D commences, and he may enter on the lands the instant that the failure happens" * * *

"In all these instances, of limitations, or conditions subsequent, it is to be observed that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed, be in itself of a freehold nature."

In 4 *Kent*, part 6, star page 132, it is said:

"If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction, for a covenant is far preferable to the tenant. * * * Whether the words amount to a condition or a limitation, or a

covenant, may be matter of construction, depending upon the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy, though conditions and limitations are not readily to be raised by inference or argument. The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case."

Note (*b*) to the last above quotation is as follows:

"The words usually employed in creating a condition are, *upon condition*; and this, says Lord Coke, is the most appropriate expression; or the words may be: *so that; provided; if it shall happen, etc.* The apt words of limitation are: *while; so long as; until; during, etc.* The words *provided always*, may, under the circumstances, be taken as a condition or as a limitation, and sometimes as a covenant."

Warvelle on Real Property, at page 115, defines Conditional Limitations as follows:

"A condition followed by a limitation over to a third person in case of breach or non-fulfillment is termed a conditional limitation. Thus, if land is granted to A, so long as he shall reside upon it, with remainder over to B, this would create a conditional limitation. That is, if A should abandon the land or select some other place of residence the estate held by him would immediately determine and the subsequent estate immediately vest in B.

A conditional limitation is therefore said to be of a mixed nature, partaking both of a condition and of a limitation; that is, of a condition because it defeats the estate previously limited, and of a limitation because upon the happening of the contingency the estate passes to the person having the next expectant interest.

"It will be seen, therefore, that an estate upon condition, as described in the foregoing paragraphs, differs materially from a conditional limitation. The estate in either case is conditional, but the distinction is that the former, while liable to defeat, yet requires some act to be done by the person who has the right to avail himself of the condition and is not in fact determined until there has been an entry or some other equivalent demonstration; the latter, on the contrary, is determined by operation of law without any act by any person, and ceases to exist upon the happening of the event by which its limitation is measured. In the former the reservation can only be made to the grantor or his heirs, who alone can take advantage of a breach of the condition, while a stranger may have the benefit of a limitation.

"In practice, the question arises most frequently in the construction of grants to churches or religious societies or of lands to be used for some public or *quasi*-public purpose. In such cases the authorities are united in declaring that the precedent estate terminates whenever the land ceases to be used for the purposes indicated in the grant and the subsequent estate at once vests without entry or any other act."

Warvelle on Real Property, pp. 115–6.

In the case of Bryan vs. Spires, 3 Brewster (Pa.), 580, it was held that "when an estate with a conditional limitation annexed is created, the grantor wholly parts with his estate, no interest being left in him; and the contingent event, when it happens, is a limitation of the first estate granted, and the estate, instead of going back to the original grantor, goes over *ex instanti* without any act but that of the law, to the party named in the very gift itself of the estate as the one to take it in that event."

In Proprietors vs. Grant, 69 Mass., 142, it was held that:

"A limitation by way of executory devise which may possibly not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years (adding, in case of a child then *en ventre sa mere*, about nine months) afterwards is void as too remote and tending to create a perpetuity.

"A devise subject to a conditional limitation void for remoteness vests an absolute estate in the first taker.

"A house and land were devised to the deacons of a church and their successors forever, 'upon this express condition and limitation, that is to say, that the minister, or eldest minister, of said church shall constantly reside and dwell in said house during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew J. H.

and to his heirs forever.' Held, that the devise over to J. H. and his heirs was conditional limitation, and not upon condition; that it was void as being too remote; and that the deacons and their successors took an absolute estate in fee" (Syllabus).

The Court in the case just quoted discusses the distinction between condition and conditional limitations, and quotes with approval the statement of the same from Blackstone and Kent hereinbefore given. The Court says at page 147:

"Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*, and being an ultimate disposition of the entire fee, as well after as before the breach of

condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

One material difference, therefore, between an estate in fee on condition and on a conditional limitation, is briefly this: that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him, as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarassed disposition of real property. It is otherwise with gifts or grants

of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory, and depending upon a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no coveyance or mode of alienation can pass an absolute title because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect."

It was also held in this case (p. 151):

> "That the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law."

In the case of Guild vs. Richards, 82 Mass., 309, a conveyance was made "In consideration of love and good will for and towards the Methodist Church and Society of A." to an individual, "in trust for the use and benefit of said church and society," with certain conditions written in the *habendum*, one of which was that "in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building, or take any control or direction of the same." It was

held that this deed created an estate upon condition; that the union of this church with the annual conference subordinate to the general conference of the Methodist Church and the conveying of the land to trustees named by such authority according to the usages of the church were a breach of the condition.

At page 317, the Court said:

> "It is of the essence of an estate on condition, that the right to enter for a breach of the condition is reserved to the grantor and his heirs. It cannot be reserved to strangers. If on the breach of the condition the estate is by the original terms of the conveyance granted over to a third person, it creates an estate upon a conditional limitation and not on a condition. * * * An estate on condition is not terminated by a breach. The law permits it to continue until an entry or claim by the grantor or his heirs. All that remains in the grantor if an estate on condition is a right of entry for breach which is sometimes called a possibility of reverter. This right or possibility although it may be released to the person holding the conditional estate, so as to vest the absolute title in him, cannot be conveyed to a stranger or a third person." [The right of entry having been waived by the grantor, is wholly gone.] *Ibd.*

In the case of Miller vs. Levi, 44 N. Y., 489, it was held that:

> "A provision in a lease that the lessor may 'terminate the lease at the end of any year, by giving sixty days' previous notice, in case he

should sell or desire to rebuild,' is not a condition, but a limitation, and the term expires by force of a sale and notice, in sixty days thereafter, without any further act on the part of the lessor. * * *

"A sale conditioned upon delivery of possession to the vendee the legal title not having actually passed from the landlord, does not terminate the relation of landlord and tenant, so that proceedings cannot be had in the name of the original lessor" (Syllabus).

In this case the Court discusses the distinction between conditional limitations and estates upon condition, citing Crabb on Real Property, Sections 2135 and 2136, to the same effect as the quotations from Blackstone and Kent heretofore quoted. The Court says:

> "For, though strict words of condition be used, if on breach of condition the estate be limited over to a third person and does not immediately revert to the grantor, as if an estate be limited to B on condition that within two years he inter-marry with C, and on failure, then to D, and his heirs, this the law construes to be a limitation and not a condition; for if a condition only A or his heirs could avoid the estate by entry, and so D's remainder might be defeated by then neglecting to enter; but when it is a limitation the estate of B determines and that of C commences, and he may enter on the lands immediately, without any act, as entry or claim."

In Webster vs. Cooper, 14 How., 488, it was held that:

"One of the conditions of the devise was that this party, as soon as he should come into possession of the lands, should take the name of the testator. But as he had not yet come into possession, and it was a condition subsequent, of which only the person to whom the lands were devised over could take advantage, a non-compliance with it was no defense in an action brought to recover possession of the land" (Syllabus).

In *Ruch vs. Rock Island*, 97 U. S., 693, it was held that:

"The breach of conditions subsequent, which are not followed by a limitation over to a third person, does not *ipso facto* work a forfeiture of the freehold estate to which they are annexed. It only vests in the grantor or his heirs a right of action which cannot be transferred to a stranger, but which they, without an actual entry or a previous demand, can enforce by a suit for the land" (Syllabus).

In *Schulenberg vs. Harriman*, 21 Wall., 44, 45, it was held that:

"No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor or his heirs or successors, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The rule equally obtains where the grant upon condition proceeds from the Government" (Syllabus).

The same doctrine obtains where a grant upon condition proceeds from the Government. No individual

can assail the title on the ground that conditions have been broken.

Holden vs. Joy, 17 Wall., 211.
Schulenberg vs. Harriman, 21 Wall., 44.
Van Wyck vs. Knevals, 106 U. S., 360.

In Gray vs. Blanchard, 25 Mass., 284, it was held that:

"The demandant, being the owner of a parcel of land with a dwelling-house thereon, adjoining on the north to land with a dwelling-house thereon, belonging to his sister, facing to the south, conveys to the tenant's grantor in fee simple, 'provided, however, this conveyance is upon the condition that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof.' After the sister has conveyed her land to a stranger the tenant mortgages by a deed reciting the foregoing provision, and afterward while remaining in possession, makes windows in the north wall. Held, that the above clause was a condition, and not a covenant that it was a valid condition, and that such breach of it worked a forfeiture of the estate and gave the demandant a right to reenter" (Syllabus).

It being established under the rule laid down by the above and foregoing authorities that the Saunders deed is a deed absolute, with a condition subsequent attached, it follows that no one aside from the grantor would have the right to enforce the forfeiture therein contained. The deed is made by Alvin Saunders, Trustee, but an examination thereof shows that he was merely a

naked trustee, and that the real party in interest and the only party who would be entitled to enforce the forfeiture, if our contention is correct, would be the City of Omaha. As supporting this position, it is important to notice the relation of the grantor, Alvin Saunders, Trustee, to the City of Omaha and to the Union Pacific Railroad Company.

On the 31st day of August, 1869, Alvin Saunders executed to the City of Omaha a certain declaration of trust. It appears that Saunders and others constituted a certain board of adjustment for the settlement with the owners of the property "to be embraced within the depot grounds and grounds for right of way connected with the bridge of the railroad company over the Missouri River," and to pay for such grounds with the proceeds of bonds issued by the city for such purpose, and to cause the property to be conveyed to the railroad company. In the management of said business, the board deemed it necessary for Alvin Saunders temporarily to take the title to said property, to be by him held in trust for the City of Omaha, and to dispose of the real estate for the purpose "aforesaid" (depot grounds and grounds for right of way connected with the bridge over the Missouri River), with such restrictions and limitations as might be deemed necessary to protect the interests of the city under the direction of said board.

Saunders took the title as Trustee and executed a declaration of trust, by which he declared that "all the lands and property * * * are held by me in trust for the sole use and behoof of the City of Omaha, to be

disposed of and conveyed by me under the direction of said board at such time as they shall request, for the purpose aforesaid, and I do hereby acknowledge, testify and declare that the consideration money paid, and to be paid, for said property is not my own proper money, but the money of the City of Omaha. And further, that on request of said board and at the charge of the said board or city, I will grant and convey the said property without any consideration therefor, as the said board shall direct for the furtherance of the objects and purposes aforesaid " (Record, Pleadings, p. 242).

The deed itself recites that Saunders was the Trustee of the City of Omaha, and that the City Council of the City of Omaha, had directed him as such Trustee, to make, execute and deliver to the railroad company a deed of said real estate, subject to the conditions and restrictions of a certain contract recited in the deed.

The City of Omaha was the real party in interest in said conveyance. The board of adjustment was a board acting for and on behalf of the city. The records of the council show that the city paid the money for the property, and that it was conveyed to Saunders to hold as Trustee for the city. He was the holder of the mere legal title, as a naked or dry trustee, and was to hold the title at the pleasure of the city, and to convey the same on its request.

In considering the construction to be placed upon the words of the instrument, a due consideration of these facts is necessary. Alvin Saunders is the nominal grantor, but the real maker of this deed was the City of Omaha. At least, in a Court of Equity, the relations

of these parties cannot be overlooked in determining the rights of the parties.

PROVISIONS OF THE NEBRASKA STATUTES.

The statutes of Nebraska, in force at the time of the making of this instrument, contains, amongst other things, the following provision:

> "The term 'heirs' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple" (Revised Stat., Sec. 52; Comp. Stat. 1901, p. 944).
>
> "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." (Revised Stats., Sec. 55; Com. Stats. 1901, p. 945).
>
> "In the construction of every instrument creating, or conveying, or authorizing, or requiring the creation or conveyance, of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest [intent] of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." (Revised Stats., Sec. 58, Comp. Stats. 1901, p. 945).

SAUNDERS' ESTATE. SAUNDERS WAS A MERE TRUSTEE. HIS INTEREST WAS THAT OF A BARREN, DRY, NAKED OR SIMPLE TRUST.

In Beach on Trusts, Vol. II., Sec. 554, at p. 1262, it is stated:

"A passive or bare trust may be defined as a trust in which the trustee is simply a depository of the trust estate. He has no active duties to perform while the relation continues, but simply holds the legal title to the trust estate for the beneficiary. On the requisition of the beneficiary it is his duty to convey to him, or to another, by his direction, the title to the trust property, and with the discharge of this obligation the trust terminates. Such trustees are designated as passive or naked trustees.

"A simple trust gives to the *cestui que trusta* right to the possession, control and disposal of the property, and the legal estate becomes executed in him, unless when it is necessary to remain in the trustee to preserve the estate for the *cestui que trust*, or to pass it to others. As a consequence, it is a general principle that a simple or passive trust cannot continue the legal estate in the trustee, except for a proper and useful purpose, such as the law will regard and protect, and as soon as the purpose fails, or ceases to exist, the legal estate becomes executed in the *cestui que trust*. In the former case equity preserves the trust to give effect to the donor's right of dominion over his property, and in the latter in favor of public policy, permits it to fall as useless" (Sec. 555, p. 1264, and notes).

Under the Statutes of Uses and Trusts either in England or in those states of the United States where such statutes are in force, the title of the dry naked trustee is at once executed in the *cestui que trust* (Secs. 561, 562, and notes).

In *Farmers & Merchants Ins. Co. vs. Jensen*, 58 Neb., 522, it was held that:

"The Statutes of Uses is not of the law of this state (Neb.)" (Syllabus).

2 Pomeroy's Equity Jurisprudence, Sec. 988, p. 1448, is as follows:

"Express private trusts are of two kinds, passive or simple and active or special: An express passive or simple, or, as it is sometimes called, pure, trust exists when land is conveyed to or held by A. in trust for B. without any power expressly or impliedly given to A. to take the actual possession and management of the land, or to exercise acts of government over it except by the direction of B. In such a case the naked legal title alone is vested in the trustee, while the equitable estate of the *cestui que trust* is to all intents the beneficial ownership entitling him to the possession, the rents and profits, and the management and control according to the extent of his estate. These passive trusts are considered in equity as virtually equivalent to the corresponding legal ownerships; the trust is regarded rather as fastened upon the estate than upon the person of the trustee; it is never suffered to fail for want of a trustee, either when the designated trustee dies, or refuses to act, or is an improper person. As a general principle the rules of law, excepting those growing out of the doctrine of tenure, have been applied by analogy as far as practicable to these corresponding passive trust estates."

It has been held by a long line of decisions that no one can take advantage of the performance of a condition subsequent annexed to an estate in fee but the grantor, or his heirs or successors, and if they do not see fit to

enforce their right to a forfeiture, the title remains unimpaired in the grantee. This rule equally obtains where the grant upon condition proceeds from the government. No individual can assail the title on the ground that conditions annexed have been broken.

Schulenberg vs. Harriman, 21 Wall., 44.
Holden vs. Joy, 17 Wall., 211.
Davis vs. Gray, 16 Wall., 203.
Ruch vs. Rock Island, 97 U. S., 693.
Van Wyck vs. Knevals, 106 U. S., 360.
Warner vs. Bennett, 31 Conn., 468.
Phelps vs. Chesson, 12 Iredells Law. (N. C.), 194.
Indianapolis R. Co. vs. Hood, 66 Ind., 581.
Plumb vs. Tubbs, 41 N. Y., 442.
Aiken vs. Albany & R. Co., 26 Barb., 298.
Hammond vs. Railroad Co., 15 S. C., 32.
Close vs. Railroad Co., 64 Iowa, 149.
Railroad Co. vs. Wiltse, 116 Ill., 449.
Hickox vs. Railroad Co., 78 Mich., 615.
Scholl vs. Coal Co., 118 Ill., 429.
Gray vs. Blanchard, 8 Pick., 291.
Cowell vs. Springs Co., 100 U. S., 55.
Hooper vs. Cummings, 45 Me., 365.

Tiedeman on Real Property, at Sec. 277, says:

"If it is a condition subsequent, the estate is defeated only at the election of the parties who can take advantage of the breach."

4 Kent (13th ed.) star pages 126, 127, is as follows:

"The material distinction between a condition and a limitation consists in this, that a condition does not defeat the estate, although it be broken,

until entry by the grantor or his heirs, and when the grantor enters he is in as of his former estate."

Washburn on Real Property, Vol. 2, Ch. 14, Sec. 12, reads as follows:

"A condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and until that is done it loses none of its original qualities or incidents."

The City of Omaha does not join in this suit, nor has it in any manner been made a party to this proceeding. It is the only one who would be entitled to institute proceedings to compel the performance of the conditions in the Saunders' deed, or insist upon a forfeiture for failure to perform said conditions. No right of action would lie on the part of any third party, such as the appellee in this case, to enforce such conditions.

We think the case of *Joy vs. St. Louis*, 138 U. S., 1, is absolutely decisive of the question that the City of Omaha is a necessary party complainant to this suit. In that case an agreement was made between the predecessor of the Wabash Railroad Company and the Commissioner of Forest Park, by which any railroad so desiring would be allowed to use certain tracks of the said predecessor of the Wabash Company. Subsequently the control of said Forest Park was taken away from commissioners and vested in the City of St. Louis. The Colorado Railroad Company wished to make use of said tracks under said agreement, but the Wabash Company refused to permit it. Thereupon suit was

brought to enforce specific performance of the agreement against the Wabash Company by the Colorado Railway Company and the City of St. Louis jointly. No attempt was made by the Colorado Railway Company alone to enforce the agreement, and the Supreme Court held that the City of St. Louis, as a successor to the park commissioners, was not a nominal, but a necessary, party to the suit.

In *Joy vs. St. Louis*, 138 U. S., 1., it was said, at page 38:

> "The covenant in paragraph 9 of the tripartite agreement created an easement in the property of the County company and the Kansas City Company for the benefit of the public, which might be availed of, *with the consent of the public authorities, properly expressed*, by other railroad companies, etc." * * *
>
> "The City of St. Louis is, in the present case, *not merely a nominal party*, but is charged with the duty of protecting the park, and of preserving and fostering the commerce of the city" (p. 51).

In the agreement in the Joy case, there was no provision for forfeiture in case of non-compliance with the conditions on its part by the railway company. In the case at bar there is such a provision. The deed states explicitly what will happen on failure to comply with its provisions, that is, the land will revert to the City of Omaha. Under this clause we contend that specific performance cannot be enforced; that by it the parties agreed on the consequences of default, and the Court will leave them to their agreement. But certainly, if the City of St. Louis was a necessary party in

the Joy case, where no penalty was provided in case of default, much more so would the City of Omaha be a necessary party in the present case, where it is expressly stipulated that in case of default the land would revert to the City of Omaha, and the City of Omaha reap the benefit from enforcing the stipulation.

But even if the condition subsequent had not been placed in the Saunders' deed, expressly providing the consequences in case the conditions therein were not complied with, we contend that appellee would have acquired no rights under that deed capable of enforcement by it, and that in no way or manner can it prosecute this action under any claimed rights growing out of the Saunders' deed.

It is manifest from the terms of that deed and the agreement incorporated therein, and all the circumstances surrounding the making of it, that the intention was to benefit the City of Omaha by making it a great railroad center, and that the incidental benefits which might accrue to individual railroads was not considered. It is very clear that what the City of Omaha wanted was to help itself, and as to any incidental benefits to any particular railroad it was absolutely indifferent. Certainly the City of Omaha never entered into this contract and spent this money with a view of helping the railroads. If it had not thought it would have been benefited by the performance of the contract, it would never have entered into it. If it had deemed that the railroads would be benefited by using the bridge, but that the City itself would not, the contract would never have been even thought of.

Is there any doubt but that the City of Omaha, if it could make this contract, could waive the carrying out of its provisions? What right, then, has the appellee, a stranger to the instrument, not in privity of contract with either party, to come to this Court and demand the enforcement of its provisions? Suppose the City of Omaha came in and expressly waived the enforcement of this contract, which was made solely and purely for its benefit, could it then be contended that the appellee would have any standing in this Court, founded on that contract? Such a contention would be absurd. The conclusion is irresistible that the City of Omaha is a necessary party to this suit as far as it is founded on its contract. This point has been expressly ruled in the Joy case, *supra*:

> "The object of protecting the park, and that of preserving and *fostering the commerce* of the city, were set forth in the tripartite agreement, and the City of St. Louis, a plaintiff in the suit as charged with those duties, was not merely a nominal party to this suit" (Syllabus).

Bonds furnished by contractors with the State provided for payment of all claims for labor and material in connection with contract. Held that as there could be no lien against the State, this provision was intended for the benefit of all furnishing labor and material, and therefore parties so furnishing labor and material could sue on said bonds.

Kaufmann vs. Cooper, 46 Neb., 644.
Fitzgerald vs. McClay, 47 Neb., 816.
And many cases cited.

The holding in the above Nebraska cases is based on reasoning strictly in line with our contention. The Court, construing the provisions of the bond in connection with the law that no liens would lie as to state property, held that it must have been *intended* that the bonds *were for the benefit of the laborers and material men*, hence allowed them to sue thereon.

Welden Nat. Bank vs. Smith, 86 Fed., 398, 402, (C. C. A. 2d Circuit, Mar. 2, 1898), it was said:

> "There are many cases in which a promise made upon a valid consideration by one person to another for the *benefit of a third* can be enforced by the third person in his own name, although he was not privy to the consideration. As was said in *Austin vs. Seligman*, 18 Fed., 522, where the general question was discussed, 'The result of the better considered decisions is that a third person may enforce a contract made by another for his benefit whenever it is manifest from the language or terms of the agreement that the parties intended to treat him as the party primarily interested.' In the language of FOLGER, J., in *Simson vs. Brown*, 68 N. Y., 355, 'The contract must be made for his benefit as its object and he must be the party intended to be benefited.' The authorities cited in *Austin vs. Seligman* and in the note to that case by Mr. Wharton are sufficient references in support of the proposition, and we shall not attempt to collate or review them."

We will give below a few quotations from the case of *Austin vs. Seligman*, approved by the Circuit Court of Appeals for the second circuit in the Welden bank case:

In *Austin vs. Seligman*, 18 Fed. Rep., 519, it was held that:

"Although the subject is one of much controversy, the result of the better considered decisions is that a third person may enforce a contract made by others for his benefit, whenever it is manifest, from the nature or terms of the agreement, that the parties intended to treat him as the person *primarily interested*. See *Hendrick vs. Lindsay*, 93 U. S., 143; *Nat. Bank vs. Grand Lodge*, 98 U. S., 123" (Syllabus, p. 519).

"Other cases decide that although by the agreement, one of the parties undertakes in general terms to assume or pay all the debts of the other, if the agreement appears to be *primarily intended for the benefit of the promisee*, he is the only person who can recover upon the promise. *Nat. Bank vs. Grand Lodge*, 98 U. S., 123; *Dow vs. Clark*, 7 Gray, 198; *Merrill vs. Green*, 55 N. Y., 270; *Pardee vs. Treat*, 82 N. Y., 385." * * *

"And the result of the better-considered decisions is that a third person may enforce a contract made by others for his benefit, *whenever it is manifest from the nature or terms of the agreement*, that the parties *intended* to treat him as the person *primarily interested*. The cases of *Hendrick vs. Lindsay*, and *Nat. Bank vs. Grand Lodge*, and the expressions in the opinions do not antagonize upon this proposition but accord with it. The language of FOLGER, J., in *Simson vs. Brown*, 68 N. Y., 355, may be adopted as a correct and accurate statement of the law, as follows: 'It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person he being neither

privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited' " (p. 522.)

We would respectfully recommend to the Court's consideration the very able and exhaustive note by Francis Wharton to the case of *Austin vs. Seligman*, referred to with approval by the Court of Appeals for the second circuit in the case of *Welden Bank vs. Smith*. We think it shows very forcibly the trouble and confusion arising out of a deviation from the rules of law as above laid down. We cannot refrain, however, from giving a few citations from that note, (p. 526):

"For these and other reasons it has been held in England that only a person to a contract can sue on it, and that the contract for the benefit of a third party cannot be sued on by such third party. At one time, it is true, it was held that on an agreement between A and B, for the benefit of C, a child of B, suit could be brought by C. This ruling, however, is no longer regarded as authoritative, and it is now firmly settled that the only parties who can sue on a contract are the parties between whom the contract is made (p. 524.)

"[In New York] it was at one time generally announced that a beneficiary can sue personally in all cases in which the contract was made with the intention to benefit such beneficiary to whom a duty was specially due by the defendant. But from the extension not unnaturally applied to this ruling, the courts after a while started back. 'I do not understand,' said RAPELLO, J., 'that the case of *Lawrence vs. Fox* has gone so far as to hold that

every promise made by one person to another from the performance of which a third would derive a benefit, gives a right of action to such third party, he being neither privy to the action nor the consideration. To entitle him to an action the contract must have been made his benefit. He must be the party *intended to be benefited.*' * * * And with a still more perceptible retreat to the old rule, DANFORTH, J., in a later case, excludes from the right of suit on a contract all strangers to whose *incidental benefit it would, if performed, inure.* Perhaps as not varying greatly from the rule as thus qualified, may be cited the case in the text, and the recent rulings of the Supreme Court of the United States on which it is based" (p. 525.)

"In case of trusts for particular objects, a bill in equity can be maintained to compel faithful performance. This has been applied to trusts, special as well as general. In such cases the difficulty arising from non-contractual claimants suing on a contractual claim is avoided (*a*) There is no possibility of a conflict between two claimants, *since both join as plaintiffs.* (*b*) The procedure is to enforce a trust, and does not rest on contract."

In Sayward vs. Dexter, Horton & Co., 72 Fed. Rep., 758, 765 [C. C. A. 9th Cir., Feb. 10, 1896], the Court said:

"But it is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was *intended* for his benefit. The fact that he is *incidentally* named in the contract, or that the contract,

if carried out according to its terms, would *inure to his benefit*, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the *intention* of the parties to secure to him personally the benefit of its provisions. (Citing many cases, including Nat. Bank vs. Grand Lodge, 98 U. S., 123, and Austin vs. Seligman, 18 Fed., 520.) There is nothing in the contract made by Harrington & Smith with Herrick indicative of an *intention* to protect Sayward from suit except for Herrick's own benefit. The parties to that agreement evidently had in view *their own advantage*, and not Sayward's. It was clearly for Herrick's protection *primarily and chiefly* that the stipulation in question was inserted. If it was the intention to protect Sayward also, that purpose was only *incidental and secondary*."

In Nat. Bank v. Grand Lodge, 98 U. S., 123, 124, it was said by the Court, as follows:

"We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary for the maintenance of an action of *assumpsit*. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. * * * Another exception is where the plaintiff is the beneficiary *solely* interested in the promise as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being *primarily for the benefit of the original debtor*, and

to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue."

In *Buffalo Cement Co. vs. McNaughton*, 90 Hun, 74; 35 N. Y. Supp., 453, it was held that a bond given by a contractor, condition that, in case he failed to pay any persons furnishing him with labor or materials, they might sue on the bond as if named therein, is intended solely for the benefit of the owner and persons furnishing materials to the contractor cannot sue thereon.

In *Greenless vs. Shinnick* (Super. Ct. Cinn., O.), 2 Whly. Law Bull., 282, it was held that, where a contractor undertakes the construction of a building for a gross sum, and gives bond with sureties for the fulfillment of the contract, there is no privity of contract between the sureties and sub-contractors, under a contract between the sub-contractors and principal contractor for part of the woodwork of the building.

In Town of Milton vs. Story, 11 Vt., 101, it was held that:

> "If A take of B an absolute conveyance of his farm, in order to enable him to obtain a pension, under a parcel agreement for his support, and then fraudently denies such agreement, whereby B becomes chargeable to the town for his support, this does not entitle the town to an action, either in law or in chancery" (Syllabus).

A stranger cannot sue upon a deed which only contains covenants between the parties, although it may contain an express covenant for his benefit.

Douglass & Easton vs. Branch Bank, 19 Ala., 659.

Hager vs. Phillips, 14 Ill. (4 Peck.), 260.

Haskett vs. Flint, 5 Blackf., 69 (Ind.); 33 Am. Dec., 452.

Strohecker vs. Grant, 16 Serg. & R., 237 (Pa.).

In *State vs. Ry. Co.*, 125 Mo., 596, it was held that:

> " Railroad companies [in providing for the joint operation of their lines] entered into an agreement whereby one agreed to save the other harmless from all its obligations, and in the same clause agreed ' to pay and surrender the same, cancelled,' as fast as they were obtained. Held, that this was only an agreement by one to ' save harmless ' the other, and hence the State as a creditor of the latter could not use thereon " (Syllabus).

In *Feist vs. Schiffer*, 79 Hun, 275; 29 N. Y. Supp., 423, it was held that an agreement between defendants and one D, recited that D undertook to settle claims of defendants against one S; that in order to effect the settlement, it was necessary to purchase a judgment against S, in favor of plaintiff's assignor, for which D gave his check; that afterwards, with the approval of defendants he stopped payment of the check; and that should any judgment be recovered against D on such check, defendants would pay the same. Held, merely a contract to indemnify D, and not a promise for the benefit of plaintiff's assignor.

In *Sav. Bank vs. Thornton*, 112 Cal., 255; 44 Pac., 466, it was held that where the mortgagee in a mortgage taken to secure the repayment of money loaned to the morgagor assumes and agrees to pay an unpaid balance due on a prior note and mortgage given by the same mortgagor to a third party, such agreement is for the benefit of the mortgagor only; and no right of action founded on the contract arises in favor of such third party incidentally to be benefited thereby.

In *Burton vs. Larkin*, 36 Kan., 246; 13 Pac., 398, it was held that a third party who is only indirectly or incidentally benefited by a contract cannot sue on it.

In *Simson vs. Brown*, 68 N. Y., 355, it was held that a third person cannot maintain an action on an agreement to which agreement and its consideration he was not a privy, unless it is made for his benefit, and he was the party intended to be benefited, and it is not sufficient that a benefit will inure to him from the performance of the agreement.

In *Williamson vs. McGrath*, 180 Mass., 55; 61 N. E., 636 (1902), it was held that an application for a loan on real estate reciting that the applicant agrees "to pay to the counsel his charges for the examination of the title, etc.," does not constitute a contract as between the counsel and the applicant, so as to entitle counsel to sue thereon for his services.

In *Opper vs. Hirsch*, 68 N. Y. Supp., 879; 33 Misc. Rep., 360, it was held that where defendant agreed with C.'s son to release a judgment against C. in consideration of services rendered defendant by C.'s son, C. cannot maintain an action to enforce the agreement, since there

was not a sufficient duty owing from the son to C. to support the action.

In *New York S. & T. Co. vs. Ry. Co.*, 97 Fed., 226 (1900), it was held that:

> "Certain railroad companies united, forming a consolidated company, the agreement providing that such company should issue its bonds secured by mortgage on its entire property, for the purpose of taking up bonds of the constituent companies, which bore a higher rate of interest, but the consolidated company did not assume the payment of their indebtedness. Such bonds were made and deposited with a trustee; the officers being authorized to effect an exchange, and if not effected, to make such arrangement as they deemed for the best interests of the company. Held, that such action was not for the benefit of the holders of the outstanding bonds, and gave individual holders of bonds of one of the constituent companies no right to compel the delivery to them severally of bonds of the consolidated company in exchange for their holdings" (Syllabus).

In *Mott vs. New York S. & T. Co.*, 60 N. Y. Supp., 357; affirmed 65 N. Y. S., 190 (1900), it was held:

> "Where an agreement for consolidation of certain railroads authorized the directors of the consolidated company to exchange its bonds for bonds of the consolidated companies on tender by the bondholders, and to take such steps as might be necessary to protect the company against bondholders who did not accept such exchange, such bondholders are not parties in interest or *cestui que trustent*

under such agreement, and hence are not entitled to sue to compel such exchange" (Syllabus).

In *Baxter vs. Camp*, 71 Conn., 245, it was held that a contract made by one with his wife, who had loaned him money, to pay it after her death to her son, if living, if not, to her next heirs to the property, without interest till after her death, can be sued on only by her personal representative; it not being executed for the direct, sole and exclusive benefit of the son, or as in the nature of a family settlement.

In the case of *Austell vs. Humphries*, 99 Ga., 408 (27 S. E., 736), it was held that a creditor has no right of action against one to whom his debtor transfers notes to a third person under an agreement between them that the transferee shall pay the debt, there being no privity of contract between the creditor and such transferee.

In *German Bank vs. Water and Light Co.*, 74 N. W., 685 (Iowa), it was held:

> "A corporation whose debts a stockholder therein promises the purchaser of his stock that he will pay cannot enforce such promise" (Syllabus).

In *Lennon vs. Lyon*, 50 N. Y. Supp., 763; 22 Misc. Rep., 505, it was held that:

> "One member of a firm agreed with a committee of his partner's estate to pay all partnership debts, and indemnify the committee against loss from claims of firm creditors. Held, that, in the absence of proof that the contract was made for the benefit of a firm creditor, he could not maintain an action upon the agreement, to recover the amount of a firm debt" (Syllabus).

In *Steele vs. McBurney*, 65 N. W., 332 (Iowa), it was held that:

> "A provision in a building contract that the owner shall hold a certain percentage of the contract price until the completion of the work is for the benefit of the owner, and does not afford a ground of personal liability by the owner to a subcontractor" (Syllabus).

EIGHTH POINT.

The limitations and reservations in the Alvin Saunders deed to the Union Pacific Railroad Company, the original Congressional corporation, were invalid as to this appellant and not binding upon it.

The Saunders deed, as set forth on page 20 of the Bill of Complaint, recites that certain premises had been conveyed to Saunders as Trustee, and that he had executed in respect thereof a certain declaration of trust, a copy of which is referred to. It further recites that the City of Omaha, by resolution passed on the 2d day of January, 1872, directed him to make, execute and cause to be delivered to said railroad company a deed of the said real estate and premises, subject to the terms, conditions and restrictions of a certain contract, a copy of which is set out.

By said deed Saunders recites that he "does hereby grant, sell and convey unto the said party of the second part, and its successors, the following described real estate (describing same) hereby limiting the use of all said premises to the legitimate purposes of depot and transfer grounds and grounds for rights and approaches to said Missouri River Bridge, subject to the conditions and restrictions contained in the contract above recited; and provides further, that in case said premises, or any part thereof, be abandoned or disused, or converted to any other than the uses and purposes hereinbefore limited, then the same shall revert to and become the property of the City of Omaha."

Under said deed, the title originally conveyed by

said Saunders, Trustee, as grantor to "The Union Pacific Railroad Company," was not absolute in fee. The grant was hampered by a limitation, so that the title of the Union Pacific Railroad Company depended upon its keeping within, and its watchful observance of the words of limitation. Under a true legal construction the Union Pacific Railroad Company must use said grounds as depot and transfer grounds for right of way and approaches to the Missouri River Bridge. This is a limitation, and it amounts to an element in the title itself. If the company should not use the grounds for the specific purpose declared in the limitation, the title is questioned, and the company might at once be called upon to submit its entire rights to the Courts. The granting clause is hampered by that which follows the description, one part of which is a limitation, the other part, being that which follows the proviso, is a condition subsequent. The limitation to the company is for "the use of all said premises to the legitimate purpose of depot and transfer grounds, and grounds for right of way and approaches to said Missouri River Bridge, subject to the conditions and restrictions contained in the contract above recited."

This part of the instrument is a limitation. The other, "that in case said premises or any part thereof be abandoned or disused, or converted to any other than the uses and purposes hereinbefore limited, then the same shall revert to and become the property of the City of Omaha," is a condition subsequent and cannot be taken advantage of by any person whomsoever. The limitation however, is invalid, and it is only the limita-

tion clause of this instrument which is challenged by this bill.

If a deed or grant contains a limitation which is in itself illegal, contrary to public policy or legislation of the state, the grant is good and the limitation is void.

Conditions, the performance of which is illegal, are void. If an estate is granted, the continuance of which depends upon the grantee doing something which is illegal or immoral, or omitting something which is his duty, the condition is void, and the estate which is vested becomes absolute.

Walker's American Law, 9th Ed., p. 350.

The Saunders deed recites that it was made in consideration of the premises and the sum of one dollar, etc., that Saunders, Trustee,

> "does hereby grant, sell and convey unto the said party of the second part, and to its successors, the following described real estate, to-wit:"

It is apparent that the "premises" mentioned in the consideration was and is the contract recited in the deed and on pages 21 to 25 of the Bill of Complaint, which embraced a scheme defined by the terms of the contract itself, to establish the *operating and actual terminus of* the Union Pacific Railroad at Omaha, in Nebraska, instead of at

> "A point on the western boundary of the State of Iowa, to be fixed by the President of the United States, by executive order dated November 17, 1864, and March 7, 1864."

whereby the eastern terminus of the Union Pacific

Railroad was definitely fixed on the Iowa bank of the Missouri River, in accordance with the Act of 1862.

The second provision of this contract reads:

> "That the eastern terminus of the Union Pacific Railroad shall be and remain at said City of Omaha."

This is the principal point in the contract. All of the remaining and important provisions of the contract closed around this and to a great extent depended thereon. This condition and term of the contract was illegal when the same was made, and could not be performed without a violation of law. The law fixed the terminus of the Union Pacific Railroad Co. (See Sec. 14, Act July 1, 1862; *Railroad Co. vs. Hall*, 91 U. S., 343–9). The contract, in so far as it embraced that element, is illegal. The deed or grant following the contract with such a condition of limitations, is good and the condition or limitation is void.

Looking to the contract as quoted in the deed, the first engagement, to construct the bridge; the fourth, to expend the sum of $100,000 within a given time for passenger and freight depots, and the fifth, to erect certain offices, shops and manufactories, were legal, and all were performed. The second, third and sixth, if read and construed together as one engagement, having for its purpose the establishment and maintenance of the terminus of the road at Omaha, are illegal. If the second, third and sixth clauses are separated, it is clear that the second, which directly provides for the establishment of the eastern terminus at Omaha, is illegal.

It is also clear that the third clause of the contract is for the same reason illegal, in that it prescribes certain details which are necessary to carry out the second clause, and it further seems that in considering the agreement, the terms of clauses two and three must be read together as one. For the same reasons it is impossible to construe the sixth clause without reading in connection therewith the second and third. The third and sixth are really identical with this exception :

The third clause provides that—

> " All passengers and freights coming from the east on all lines of road *seeking a connection with said Union Pacific Railroad at its eastern terminus*, shall be delivered and transferred to the Union Pacific Railroad Company upon said depot grounds, *where the Union Pacific trains shall be made up for the west*, and that said party of the first part will after such bridge completion, transfer upon said grounds to the various railroads that do or may *begin* or end in Council Bluffs or Omaha, all its passengers, baggage, express matter, mails and freight north, east or south bound."

This clause would, therefore, cover all roads coming into Omaha or Council Bluffs from the east or west and terminating therein. But the idea evidently occurred to the grantor that a road might come in from the west and not terminate either at Council Bluffs or Omaha, but pass directly through these two cities, making them in effect nothing but way stations. This would not carry out the idea evidently in the minds of the grantors as to making a great railroad terminus at Omaha.

It was, therefore, necessary to make some modification covering railroads which not only *began* or *ended* in Omaha or Council Bluffs, but also railroads which *pass through* Omaha or Council Bluffs. They therefore had the sixth clause incorporated in the agreement, which covered this contingency, and in order to make it a terminus in fact as well as in name, they further provided that if such railroads did pass through Omaha or Council Bluffs, the Union Pacific Railroad Company should have the option of substituting its own engines in place of the engines of such other roads in crossing said bridge, receiving reasonable compensation therefor. This would compel any railroad company which passed through Omaha and Council Bluffs to turn over its train to the Union Pacific Railroad Company in Council Bluffs, to be hauled to the Omaha station, and there redelivered to the said road, or to turn over its trains at the Omaha Station to the Union Pacific, to be hauled to Council Bluffs, and there in the same way redelivered to the road, making it absolutely necessary for every railroad company passing through to really have a terminal in Omaha. So that we must of necessity read the sixth clause, in connection with clauses two and three, and being in compliance with the general illegal scheme to make the terminus of the Union Pacific at Omaha, and being inseparably bound up with the second and third clauses, it would be equally illegal with said clauses, and the grant would be good regardless of the conditions found in the second, third and sixth clauses.

If a condition subsequent be possible at the time of

making it, and becomes afterwards impossible to be complied with by the act of God or by law, or the grantor, the estate once vested is not thereby divested, but becomes absolute.

1 Warvelle on Vendors, Sec. 12, page 451.
Davis vs. Gray, 16 Wall., 203.
Elliott on Railroads, Sec. 491, page 1309.
Stuyvesant vs. Mayor, 11 Paige (Ch. N. Y.), 414.

The rule applicable to all deeds, that the language of the condition is to be taken and construed more strongly against the grantor than against the grantee may be well invoked and applied in the case of conditions subsequent.

Anderson's Law Dictionary, p. 1085.

The intention of the parties is to be gathered from the whole deed and conditions and the Court should place itself, as near as possible, in the situation of the parties, to see what they really meant.

Good Title vs. Bailey, 2 Cowp., p. 597.
Gibson vs. Minet, 2 Browns, House of Lords Repts., p. 48.
2 Elliott on Railroads, Sec. 419, p. 561.
Louisville & Nash. R. Co. vs. Koelle, 104 Ill., 455.

NINTH POINT.

We believe this case should be reversed. We are confident that the broad and sweeping decree and order which has been entered herein must be set aside by this Court. The law does not authorize it, nor do the statutes relied upon by appellee direct it.

There is no public exigency or necessity here. There is not a word of evidence in the record showing that the public is interested in this controversy, or that its rights will be affected one way or the other by the final determination herein. There is no appeal for more facilities by the public. Ample and sufficient service is afforded. Numerous lines in and out of Omaha, fully equipped, take care of the transportation interests of the public in the Cities of Omaha and Council Bluffs.

The expressions in the Rock Island case were made, we believe, under a misapprehension of the real facts in the case, and we are confident that had the latter been called to the Court's attention, the expressions as to these particular statutes would not have been used.

The fact is, that this strong and extraordinary arm of the law is invoked by appellee to avoid the expense of building across the river and into South Omaha. This sweeping decree grants to appellee rights and privileges far beyond the most liberal construction of statutes or contracts.

It is no answer to say that appellee will pay the rent. There are many other considerations which enter into the right of appellant to use its own property in its own way, than the one that if another is permitted to use its property, that other will pay it rent.

By the terms of this decree appellee is permitted to enter and use appellant's premises, its bridge, its main line, its side tracks, its terminal facilities, its warehouses, its depots at Council Bluffs, Omaha, and South Omaha, necessitating consultations, conferences, arrangement of schedules, operation of trains, and a multitude of other acts and doings which necessarily follow from close association, and to all of which appellant is opposed. It does not desire this arrangement, declines to enter into this alliance, refuses to make this co-partnership, and confidently asserts that there is no justice or equity in the prayer of appellee for relief, and that the decree of the Court below is wrong in fact, in principle, and law.

We respectfully ask that the judgment and decree of the Court below be reversed.

October, 1905.

JOHN N. BALDWIN,
MAXWELL EVARTS,
Of Counsel for Appellant.

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ITED STATES SUPREME COURT.

OCTOBER TERM, 1904.

SON CITY & FORT DODGE
AILROAD COMPANY,
Complainant and Appellee,

vs.

ION PACIFIC RAILROAD COM-
PANY,
Defendant and Appellant.

STATEMENT OF FACTS.

Before stating the facts a brief statement will e made of the organization of the plaintiff, defendnt, and the various other Pacific Railroad Comanies. For convenience, the complainant will be nown as the "Mason City Company;" the various Pacific Companies as the "First Pacific Company," "Second Pacific Company" and "Third Pacific Company."

Organization of First Pacific Company;

The original Union Pacific Railroad Com was incorporated under the Act of Congress of 1st, 1862, and will be herein known as the "Firs cific Company."

of Second Pacific Company;

The Union Pacific Railway Company was consolidated company of January 24th, 1880, and be herein known as the "Second Pacific Compa

of Third Pacific Company.

The defendant, the Union Pacific Railroad pany, was incorporated in the latter part of the 1897, under the laws of Utah, and is herein know the "Third Pacific Company."

Questions involved in this case.

This is an appeal from the decree of the Ci Court of Appeals of the Eighth Circuit affirming decree of the Circuit Court of the District of braska, granting the Mason City Company the e and joint use of the Third Pacific Company's br across the Missouri River between Council Bl Iowa, and Omaha, Nebraska, its Union passenger tion at Omaha, and its main and passing rail tracks between Council Bluffs, Omaha and So Omaha, upon the same terms and conditions speci in the contract between the Union Pacific Rail Company, the Chicago, Rock Island & Pacific R way Company, and the Chicago, Milwaukee & Paul Railway Company, which contract was s tained by the Supreme Court of the United State

Union Pacific Railway Company v. Chicago, etc. Railway Company, 163 United States, 564.

The controversy in this case involves the same property between Council Bluffs, Omaha and South Omaha, that was involved in that case, in which this court held that under the charter of the Union Pacific Company and the Bridge Acts, a duty was imposed upon the Union Pacific Railway Company to allow any other company the joint use of the bridge and railway tracks above described, on payment of reasonable compensation. These acts are printed in Appendix D to this brief, and are as follows:

Act of Congress of July 1, 1862, (12 Stat. 489); July 2, 1864, (13 Stat. 356); July 25, 1866, (14 Stat. 244); February 24, 1871, (16 Stat. 430).

The Mason City Company had, prior to the entry of this decree, purchased and constructed a line of railway from Hampton, Iowa, and from Manly Junction, Iowa, through Fort Dodge to Council Bluffs, where it connects with the Third Pacific Company's tracks. At Hampton and at Manly Junction it connects with the Chicago Great Western Railway, which latter company operates it, thereby constituting a through line of rail from Chicago, to St. Paul, Minneapolis, Omaha, Kansas City, and other places.

The Mason City Company claims the right to use this property under said Acts of Congress, and also under a contract entered into between the City of Omaha, the County of Douglas, Nebraska, and the Union Pacific Railroad Company, under which contract the Union Pacific, its successors and assigns, in consideration of receiving about $450,000 bonus, agreed that the trains, cars and engines of all railroads then or thereafter running into or out of Omaha and Council Bluffs, should have unobstructed access and transit to and over said bridge and its approaches, and such roads should have the right to take or cause to be taken, their trains, cars and engines with their freight and passengers, over and across said bridge and its approaches, at reasonable compensation, without discrimination, hindrance, preference or delay.

The facts upon which these claims rest are substantially as follows:

Land grants and bonus.

The First Pacific Company was incorporated under the Act of Congress of July 1st, 1862. It was given a large grant of lands, and also a bonus of $16,000 per mile in government bonds. On March 7th, 1864, President Lincoln fixed as the eastern terminus of said railroad a "point in the western boundary of the state of Iowa east of and opposite to the east line

Section 10, in Township 15, north of Range 13, l east of the Sixth Principal Meridian in the Terri- y of Nebraska''—Bill of complaint, page 6, An- er, page 4. But the First Pacific Railroad Com- ny did not commence the construction of its line at s point. The initial point from which the con- uction commenced was a point at the north line of tion 10, Township 15, Range 13, in Nebraska Ter- ory; and from this point it constructed its line rough Omaha, a distance of 1038.43 miles, to the stern end of the line, where it connected with the ntral Pacific Company, about five miles northwest Ogden. This line was completed May 10, 1869— ecord, page 515. For this part of the line the gov- nment issued subsidy bonds to the amount of $27,- 6,512.00—Testimony of Alexander Millar, Record ge 461; Pacific Railroad Laws, Appendix D, page 3, Section 5, Act of 1862; pages 401 and 404, Sec- ons 8 and 11, Act of 1864. For this part of the line e Company also received a grant of lands amount- g to ten sections per mile within the limits of enty miles on each side of the road—Section 3, Act 1862, page 370, Section 4, Act of 1864, page 397. nder this act of 1864, the Government also consent- that the Union Pacific Railroad Company might ake a first mortgage on the said railroad prior to

Construction of Union Pacific.

Consent of Government to first mortgage.

the Government lien, for the same amount as the Government subsidy bonds. It was under this act that the Union Pacific Railroad Company made its first mortgage—Act of 1864, Section 10, page 403.

Bridge Act of 1871.

After the completion of this part of the railroad, the Union Pacific Company was without funds to build the bridge across the Missouri River to the eastern terminus of the line. It could only raise $16,000 per mile of government bonds, and $16,000 per mile of first mortgage bonds, with which to construct the bridge, its approaches, depots and tracks connected therewith. In this condition the First Pacific Company applied to Congress for relief. It sent General Grenville M. Dodge, with others, to Washington, and procured the passage of the Act of 1871, under which it mortgaged the bridge, depots and tracks, and raised money with which to construct them—Testimony of Dodge, Record, page 515. This Act is set forth in Appendix D of this brief, pages 427 and 428, and provided as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *That for the more perfect connection of any railroads that are or shall be constructed to the Missouri River, at*

or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; *and for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges, and to establish them as post roads,'* approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto: And provided, That nothing in this Act shall be so construed as to change the eastern terminus of the Union Pacific Railroad from the place where it is now fixed under existing laws, *nor to release said Union Pacific Railroad Company, or its suc-*

cessors, from its obligations as established by existing laws: Provided also, That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half millions of dollars; Provided, That if said bridge shall be constructed as a drawbridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw."

Act of 1866.

The Act of Congress referred to, was the Act of July 25th, 1866 (Appendix D, pages 420 to 427 of this brief), and among other things provided as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and

over said bridge *railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point shall be allowed to cross said bridge for reasonable compensation,* to be made to the owners of said bridge, under the limitations and conditions hereinafter provided."

First bridge mortgage.

The Bridge Act was approved February 24, 1871, and on April 1, 1871, the Pacific Co. mortgaged the bridge and its approaches as authorized by this Act —Exhibit 1, page 66, Bill of Complaint.

It made a supplemental mortgage on the 27th day of the same month, which is not material to this issue.

Turning to this mortgage we call the Court's attention to the description of the property and the recitals in the mortgage. The first recital is as follows, Bill of Complaint, page 66:

"Whereas, *By an Act of Congress of the United States, approved 22nd day of February, 1871, the Company is authorized to construct a bridge and railroad line across the River Missouri, between Omaha, in the State of Nebraska, and*

Council Bluffs, in the State of Iowa, and to issue such bonds, not exceeding two millions and a half of dollars, as it might deem needful for that purpose, and to secure the same by mortgage on the bridge and its approaches and appurtenances."

The property so mortgaged is in part described as follows, Bill of Complaint, page 74:

"*all and singular, the said bridge over the River Missouri, between Omaha and Council Bluffs, and the approaches thereof, and the appurtenances belonging thereto, including all parts and portions of the said bridge now constructed or hereafter to be constructed, and the depots at Council Bluffs and Omaha as aforesaid, and the lines and tracks required to perfect the said bridge, its approaches and appurtenances,* and to connect the same with the neighboring lines included in this conveyance as well the lines and tracks now constructed as those which may hereafter be constructed, and also all estates, terms and rights of way of the said bridge, approaches and appurtenances, as well now held by the Company as to be hereafter acquired by it, and all the rights and privileges of the said Company of, in or to the said bridge, approaches or appurtenances, or

touching, concerning or appertaining to the maintenance, use and occupation thereof."

Right to fix tolls.

Article I of the mortgage gave the Trustees the ght to fix tolls in the event of a default as follows, ll of Complaint, page 69:

"The Trustees * * * shall, so long as any of said bonds shall be outstanding, or unpaid, have the right to fix the tolls to be levied upon all property and passengers to be transported over, or which shall use or have the benefit of the said bridge, or the depots connected therewith at Council Bluffs, or Omaha, or the lines of track required to connect the said bridge with the railways having their terminus at Omaha and Council Bluffs."

Consolidation of Pacific Companies.

The Bill alleges, and the answer admits the consolidation of the various Pacific Railway Companies nder the head of the Union Pacific Railway Company, herein known as the Second Pacific Company. This consolidation took place about January 24th, 1880.—Bill of Complaint, page 15; Answer, page 9; Articles of Consolidation, Record, page 410, *et seq.* After this consolidation the Second Pacific Company made a renewal bridge mortgage—Exhibit No. 3, Bill page 95, *et seq.* This mortgage was dated on Octo-

Renewal bridge mortgage.

ber 1st, 1885, and also recited that under the Act of 1871, the Union Pacific Railroad Company was authorized to construct a bridge and railroad lines across the Missouri River, and to make a mortgage and to secure the same upon the bridge, its approaches and appurtenances. The description of the property contained in this mortgage in part is as follows, Bill of Complaint, pages 101 and 102:

> "*All and singular the bridge, approaches and appurtenances thereto, over the Missouri River, between Council Bluffs, Iowa, and Omaha, Nebraska, mentioned and described in said Act of Congress, approved February 24th, 1871, together with the rents, earnings, issues, tolls, incomes and profits thereof, including all parts and portions of said bridge, now constructed or hereafter to be constructed, and the depots, at Council Bluffs and Omaha aforesaid and the railroad thereover, and the lines and tracks required to perfect said bridge, its approaches and appurtenances, and to connect the same, with the lines of any railroads that are now or shall hereafter be constructed to the Missouri River at Council Bluffs, Iowa, or Omaha, Nebraska*, a map and description representing and describing the general features of which

property is hereto annexed and made a part hereof; but the same shall not be considered exclusive of other property covered hereby; and also all the estates, lines, rights of way, as well now held by the Company as to be hereafter acquired by it, and all the rights and privileges of the Company, of, in or to the said *bridge, approaches, and appurtenances*, or touching, concerning, or appertaining to the maintenance, use and occupation thereof; and also all and singular the franchises now owned, possessed, or acquired, or which shall hereafter be owned, possessed or acquired, by said railway company in respect of said bridge, approaches, and appurtenances thereto, and railroad thereover."

This mortgage had the same provision in relation to fixing tolls on the lines of track required to connect the said bridge with the railways having their terminus at Omaha and Council Bluffs—Article 1, Mortgage, Exhibit 3, page 95, Bill of Complaint.

What the bridge approaches, tracks, etc., included.

A reference to the map attached to this mortgage (Bill of Complaint page 120) will show that as first constructed, the bridge, its approaches and depot, and tracks connected therewith, extended from Council Bluffs to about Twentieth Street in Omaha,

but we call the Court's Attention to the fact that this map is stated in the mortgage not to be considered exclusive of other property. The Answer admits the making of these mortgages (Answer, pages 9 and 10), and also contains the following specific allegation—Answer, page 6:

Bridge was built with money raised on bridge mortgage bonds authorized by Act of 1871

"Further answering defendant admits that the money raised by certain so-called bridge mortgages in said bill described was used by The Union Pacific Railroad Company, during the years 1871 and 1872, in constructing a bridge across the Missouri River, and tracks and depots connected therewith, extending from the eastern terminus of the Union Pacific Railroad Company at Council Bluffs, in the State of Iowa, to a point at about Twentieth Street, in the City of Omaha, Nebraska, a distance of about three and ninety-eight hundredths miles; but it alleges that the said bridge was constructed and the said terminal facilities, lands, tracks and depots connected therewith, were acquired, constructed, owned and operated by said railroad company under the authority of the Acts of Congress of 1862 and 1864, aforesaid."

PAGE CUT OFF

The answer also contains the following denial and allegation, page 8:

> "It admits that no subsidy bonds or patents of land were delivered by the United States in respect of any of the so-called Bridge Division property. It denies that the same was constructed under or by virtue of the Act of 1871, or under the authority thereof, or subject to the conditions and limitations as to the use thereof by other railroads as in said bill alleged, and it submits that by reason of the facts hereinafter stated, that whatever burdens, conditions or limitations were by said Act of 1871, imposed upon said railroad company or its successor, the said The Union Pacific Railway Company, are of no binding force or effect, as against the said property of this defendant."

Act of 1871 binding on first and second Pacific Companies.

We cannot believe that it will be seriously contended that the First Pacific Company, and the Second Pacific Company, did not accept the terms and conditions of the Bridge Act of 1871, and the Act of 1866, referred to therein. On this point the testimony is overwhelming. It appears by the testimony of General Dodge, Record, page 515, that after the completion of the main line of the road on May 10,

1869, the Union Pacific Company was without means with which to build the bridge; that it applied to Congress and procured the passage of the Bridge Act of 1871. This of itself is sufficient to show its acceptance, but in addition to this, it mortgaged the bridge, depots and tracks connected therewith, as authorized by this Act, and in the mortgage it was recited that by the Act of Congress of 1871, the company was authorized to construct the bridge and railroad line across the Missouri River, between Omaha in the State of Nebraska, and Council Bluffs in the State of Iowa, and to issue bonds as might be needful for that purpose, and to secure the same by mortgage on the bridge and its approaches and appurtenances. It is admitted that it did issue the bonds and with the money constructed the bridge, depots and tracks. In the Bridge Mortgage of 1885, made by the Second Pacific Company, consolidated under the Act of Congress, the same recitals are contained. It further appears that, as authorized by this Act, the First Pacific Company and the Second Pacific Company, for many years did charge and levy bridge tolls for the use of the property between Council Bluffs and Omaha—Record, Volume 2, page 773.

Not only that, but during the receivership, bridge tolls were charged and a separate account

kept of the earnings, as authorized by this Act. It further appears that the Second Pacific Company, and the present Pacific Company, from 1890 down to and including 1898, made contracts with the various railroad companies, allowing them to run their trains over the bridge, depots and tracks connected therewith, from Council Bluffs to South Omaha, as authorized by this Act.

Donation of bonds by city and county.

It appears from the bill and answer, and the records introduced in this case, that during the years from 1868 to 1872, the city of Omaha, and the county of Douglas, donated to the First Pacific Company $450,000 of ten per cent bonds, to aid the Union Pacific Railroad in the construction of its bridge, approaches, depots and tracks connected therewith. The $200,000 of bonds issued by the city were sold and the proceeds thereof used to purchase the ground for depot and bridge approaches in the city of Omaha, and the said ground and the said county bonds of $250,000 were so donated on the conditions and covenants contained in a contract which is set forth in full in the deed of said depot property by Alvin Saunders, Trustee, to the Union Pacific Railroad Company, contained on pages 20 to 30, of the Bill of Complaint, which deed was recorded on February 2, 1872, in the office of the county clerk of Douglas coun-

Deeds of depot property.

ty, as required by law. This original deed was introduced in evidence—Testimony of Bettis, Record, page 21. Mr. Bettis testified that this deed was among the records of the Union Pacific Railway Company, when it was taken over by the defendant, that it was among the deeds and titles of the present defendant company. He also testified that the original contract between the city, county and the First Pacific Company, could not be found in the office of the Union Pacific Railroad Company. The answer admits the making and recording of the Saunders deed —Answer, pages 10 and 11, and admits that it was accepted by the First Pacific Company—Answer, page 11; and admits that the grounds described in the said Saunders deed, have been used as a part of the depot grounds, yards, terminal facilities and approaches at Omaha, between the west end of the bridge and the said junction point at or near Twentieth street, in the City of Omaha—Answer, page 12. The answer, however, alleges that in respect to the voting of bonds by the City and County, and the purposes for which said County and City voted the same, or as to whether any part of the same was used for the purchase of the real estate described in the Saunders deed, the defendant has no knowledge. This, possibly, raises an issue of fact. It is conclusively

Saunders deed a link in defendant's chain of title.

Conditions upon which lands were conveyed.

ed, however, that the allegations of the bill are . The deed, which is a link in the chain of the ndant's title, to the depot grounds and bridge roaches, recites that the lands were paid for by City of Omaha, and conveyed to Saunders to be l in trust, to be deeded on the terms and condi- s stated in a certain contract made between the y, the County, and the First Pacific Company, ed January 1, 1872, and contained in the deed— l of Complaint, pages 20 and 21. That contract ites the receipt of the bonds of Douglas County, in sum of $250,000, and the receipt of the lands from City. It further appears by the testimony of . Kountze, one of the committee appointed by the y Council to negotiate the bonds of the City to rchase the depot grounds and bridge approaches, d enter into a contract with the Union Pacific Rail- ad Company, that the $200,000 of bonds were sold, d the said lands in the Saunders deed purchased th the proceeds—Testimony of Kountze, Record, ge 521. The original contract cannot be found— stimony of City Clerk, City Treasurer and the unty Clerk, Record, pages 132 and 133, but a copy the contract is contained in the minutes of the eetings of the Common Council of the City of Oma- a, Record, page 263, *et seq.* It further appears by

the records of the City Council, introduced in evidence, that at a council meeting held January 8, 1868, the following resolution was passed, Record, page 247:

Resolution of City Council authorizing voting of bonds.

"Be it resolved by the City Council of the City of Omaha, That the City of Omaha assume and bear the expense and cost of securing to the Union Pacific Railroad Company, free of cost, the right of way for a track from the bridge crossing of the Missouri River, known as Line Number Two (2) or Lower Omaha Crossing, to its intersection with the track of said company already built, and also for a track from said crossing to the Machine Shops and Depot of said road, and also such grounds for depot purposes as may be deemed necessary by the Chief Engineer of said road, and being about twelve (12) acres, as shown on the maps in the Engineer's office, and, in case the upper crossing shall be adopted, and the bridge located at or near that point, we pledge the like aid; And that the Mayor be and is hereby directed to call an election for the purpose of deciding whether or not a loan shall be made by the City of a sum sufficient for that purpose."

Special city election to vote on bonds.

It appears that on June 30, 1868, a special elec-
n was called for the purpose of voting $150,000 of
nds "*for the purpose of paying for the necessary*
ht of way and depot grounds in said City of Oma-
required by the Union Pacific Railroad Company,
connection with its bridge across the Missouri Riv-
" It further appears that thereafter steps were
ken to vote $50,000 additional bonds, and to in-
ease the interest upon the first bonds to ten per
nt. These bonds were voted—Record, page 252.
he record shows that the Mayor was authorized to
thograph the bonds—Record, page 253; and also
ontains the following resolution, passed May 29,
869—Record, pages 254 and 255:

"Council Chamber, May 29th, 1869.

Ald. Evans offered the following resolution which was adopted:

Resolution of City Council, May 29, 1869.

Whereas, by resolution of the City Council passed March 24th, 1868, Ezra Millard, Augustus Kountze, O. P. Hurford, George L. Miller, Enos Lowe and Alvin Saunders were appointed a committee to represent the interests of the City of Omaha before the Board of Directors of the Union Pacific Railroad Company in New York and other Railroad Com-

panies in any matters arising before said Companies involving the interests of said City.

And Whereas, in pursuance of the action of said committee in the premises in securing the location of the Railroad bridge across the Missouri River at Omaha, the qualified voters of said City did duly authorize the issuing of the bonds of said city to the amount $200,000 for the purpose of securing the location of said bridge at Omaha, and for purchasing for said Railroad Company the right of way and depot grounds in the City of Omaha.

Therefore, Resolved, That said Ezra Millard, Augustus Kountze, O. P. Hurford, George L. Miller, Enos Lowe and Alvin Saunders be and are hereby authorized and empowered to negotiate the said bonds without loss to the City, and to adjust and settle all claims against the said City for securing the location of said bridge, the right of way and depot grounds as aforesaid. And the City Clerk is hereby directed to seal and deliver to said parties the said bonds, taking therefor their receipt for the same duly numbered and stated, and said committee are required to make report of their action in the premises to the City Council."

The record also shows that the City borrowed ey to pay the interest on these bonds—Record, e 257. It also appears that the Union Pacific iroad Company petitioned the City to vacate the ets situated within the limits of the depot unds, so-called, which were agreed to be acquired hout cost to the company, by the City of Omaha donated to said company—Record, pages 259 and ; that this petition was passed on by the city; t it was granted, and the city authorities directed convey the said streets and alleys according to the ayer of the petition. This conveyance was made the 27th day of July, 1872, and was introduced in dence--Record, page 275. The streets and alleys vacated are marked upon the map, Complainant's hibit, 4 a and have ever since been used as a part the depot grounds and bridge approaches. It also pears that on January 2, 1872, Saunders was au- orized to convey the depot grounds to the First acific Company, in accordance with the terms and nditions of a certain contract entered into between e said company and the City and the County, which greement was spread upon the minutes of the meet- g on February 1, 1872—Record, pages 261, 263.

Petition of Railroad Company to vacate streets.

On the part of the county, it appears that on pril 30, 1868, a special election was called to be held

Special county election to vote on bonds.

on June 6, 1868, to submit to the voters the proposition of voting $250,000 of bonds, the object stated in said resolution being as follows:

Resolution authorizing delivery of bonds by county.

"Shall the County of Douglas, for the purpose of securing the location and aiding in the construction of a railroad bridge across the Missouri River between the Union Pacific Railroad, and such other roads as may seek a connection therewith at Omaha in said county, contribute thereto in county bonds the sum of $250,000?" etc.

A resolution appears on January 8th, 1872, reciting that the bridge bonds were voted on July 3, 1868, and on January 8, 1872, the following resolution was adopted by the Board of County Commissioners —Record, page 272:

"(Commissioners' Record C, 108)

Omaha, Neb., January 8th, 1872.

Board met pursuant to adjournment. Among other proceedings the following:

On motion the Board adopted the following, to-wit:

Resolved, That the bonds voted for in aid of the construction of the Union Pacific Railroad Bridge, to the amount of $200,000.00, be immediately signed and dated January 1st, 1872, to be delivered to the proper authorities

of the Union Pacific Railroad Company, *only upon condition, that the contract, a draft of which is filed with the County Clerk, and deposited in his office, shall be duly and legally executed by the proper officers of the Union Pacific Railroad Company.*

Resolved, That in the event of the execution and delivery by the said Union Pacific Railroad Company, of the Contract referred to in the foregoing Resolution, the bonds for the remaining $50,000.00, voted for in aid of the construction of said Bridge, being the last installment provided for that purpose, shall be signed as of the date when the said Bridge shall be completed and finished, so as to be in good and sufficient order for the passage of trains, and issued and delivered to the said Union Pacific Railroad Company, as soon as the evidences of the completion of said Bridge as aforesaid are properly presented to the board of County Commissioners."

It appears that $50,000 of the bonds were only to be delivered after the bridge was completed. There next appears a receipt by the Union Pacific Railroad Company of the last $50,000 in full for the bonds. It will be noted that this resolution authorizes the de-

Receipt of Union Pacific for bonds.

livery of the bonds only upon the conditions stated in the contract made between the Union Pacific Railroad Company, and the City and County.

Tripartite agreement in Saunders deed.

We now come to the contract contained in the Saunders deed. This deed was made on the 20th day of January, 1872, and forms a link in the chain of title of the defendant company, and contains the following agreement—Record, pages 197 to 199:

> "Agreement made this first day of January, in the year of our Lord one thousand eight hundred and seventy-two, by and between the *Union Pacific Railroad Company, authorized by law of Congress to build a bridge across the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska, and its successors, party of the first part, and the City of Omaha, Nebraska, and the County of Douglas, in the State of Nebraska, parties of the second part, Witnesseth: That whereas, the parties hereunto desire to arrange for the more perfect connection of any Railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska.*
>
> Now, in consideration of the premises and the receipt by the party of the first part of the Bonds of said Douglas County, to the amount

of two hundred and fifty thousand dollars, and in further consideration of the receipt by the party of the first part of a deed from the said City of Omaha, to certain real estate in said City, known as the Depot grounds and right of way.

The party of the first part, for itself and its successors, covenants and agrees to and with the said County of Douglas, and the said City of Omaha, as follows, to-wit:

First. That it will construct, complete and maintain a Railroad Bridge over the Missouri River at the said City of Omaha.

Second. The eastern terminus of the Union Pacific Railroad shall be and remain at said City of Omaha.

Third. That after its Missouri River Bridge at the City of Omaha is completed and ready for use, the said Union Pacific Railroad Company will make up all its regular West-bound passenger and freight trains on the grounds which the people and City of Omaha propose as above to deed to said Union Pacific Railroad Company, and as is already mapped and platted, that is to say, All passengers and freights coming from the East on all lines of

road seeking a connection with said Union Pacific Railroad at its Eastern terminus, shall be delivered and transferred to the Union Pacific Railroad Company upon said Depot grounds where the Union Pacific trains shall be made up for the West, and that said party of the first part will, after such bridge completion transfer upon said grounds to the various Railroads, that do or may begin or end in Council Bluffs or Omaha, all its passengers, baggage, express matter, mails and freight, North, East or South bound.

Fourth. That said Union Pacific Railroad Company will within one year from the date hereof, expend in improvements in the building of passenger and freight depots, general passenger and freight offices, land offices and transfer and telegraph offices upon said grounds, a sum that shall not be less than one hundred thousand dollars, and to maintain these buildings and offices thereon.

Fifth. All machine, car shops and other manufactories required for the use of said Company, at its Eastern terminus, all permanent offices of the Company required for the transaction of its business, including the Land

Department, general Superintendent's Offices, general Passenger and Freight Offices, Warehouses for the Company's use, &c., shall be erected and maintained at Omaha.

Providing for the use by all other railroads.

*Sixth. *That under proper rules for their regulations to be prescribed by said party of the first part, the trains, cars and engines of all railroads now or hereafter running into or out of Omaha and Council Bluffs, shall have unobstructed access and transit to and over said Bridge and its approaches, and such roads shall have the right to take or cause to be taken their trains, cars and engines, with their freight and passengers over and across said Bridge and its approaches, at reasonable compensation without discrimination, hindrance, preference or delay.* Provided, however, that the Union Pacific Railroad Company shall in all cases have the option of substituting its own engines for those of such other roads in the operating of its said Bridge, receiving reasonable compensation therefor. The object of this clause being to make a virtual and operating connection upon said transfer grounds, between all the railroads desiring such connection which do or may begin or end in or pass through Omaha

*Italics are ours.

or Council Bluffs, and the trains and business of said roads. In Witness Whereof, the said party of the first part has caused these presents to be executed in triplicate by its Vice-President hereby binding said Union Pacific Railroad Company and its successors, to the covenants and agreements herein contained, and the parties of the second part, by their authorized officers, have hereunto set their hands in triplicate the day and year first above written."

After conveying all of the property which is specifically described, and which will be found colored yellow upon the map, Complainant's Exhibit 4a, the deed contains the further clause—Record, page 201:

"Hereby limiting the use of all said premises to the legitimate purpose of depot and transfer grounds and grounds for right of way and approaches to the said Missouri River Bridge, subject to the conditions and restrictions contained in the contract above recited."

The intention of Congress, the City of Omaha, and the County of Douglas to establish a connecting link.

When the Congress, the City of Omaha, and County of Douglas, provided for a more perfect connection of any roads that then were, or should thereafter be constructed to the Missouri River, at or near

Council Bluffs, Iowa, and Omaha, Nebraska, and provided for the use of the bridge, approaches, depots and tracks connected therewith, by other companies, for the purpose of making said connection, what tracks was it intended that the other lines of road should have the right to run their trains over for the purpose of making said connection between the eastern and western lines? Our contention is that it was such property as was necessary to connect the eastern lines constructed to the Missouri River, at or near Council Bluffs, Iowa, and at or near Omaha, Nebraska. As bearing upon this question the following testimony was submitted:

Lines connecting at Council Bluffs.

All the lines of railway reaching the Missouri River at Council Bluffs, connect with the Union Pacific Railroad at the transfer depot in Council Bluffs. Complainant's Exhibit 4c will show the different tracks of the said companies, and the manner of connecting. They are as follows:

Chicago, Burlington & Quincy Railway,
Omaha & St. Louis Railway (now the Wabash),
Chicago, Rock Island & Pacific Railway,
Chicago, Milwaukee & St. Paul Railway,
Kansas City, St. Joseph & Council Bluffs Railway,
Chicago & Northwestern Railway.

The Sioux City & Pacific Railway also connected at one time, but this is now owned by the Chicago & Northwestern Railway Company. The Illinois Central Railroad connects, but it does not use the Union Pacific Bridge; it only uses the passenger station, and certain tracks in the City of Omaha—Testimony of Horace G. Burt, Record, page 16.

Lines connecting west of river.

On the west the connections are shown on Complainant's Exhibit 4d. They are as follows:

Fremont, Elkhorn & Missouri Valley Railway, over an intervening strip of track lately constructed by the Chicago & Northwestern Railway Company; the Chicago, Rock Island & Pacific Railway, about 1500 feet below the South Omaha station of the Union Pacific Railroad Company; the Missouri Pacific Railway, near Gilmore Junction; the Chicago, Burlington & Quincy Railway near the Missouri Pacific connection; the Omaha Belt Line Railway connects near the connection of the Chicago & Northwestern Railway; and the Union Stock Yards Railway also connects with the Union Pacific Railroad near the station in South Omaha, this railway has about thirty miles of track, is owned by the Union Stock Yards Company, and all of the packing houses and stock yards are situated exclusively upon its tracks.—Testimony of Scott King, Record, page 382.

et seq. So that all of the business of the various packing houses and of the stock yards is necessarily done over the tracks of the Union Stock Yards Company. This business, as appears by the testimony of Mr. Kenyon, amounts to 172,204 cars per annum—Kenyon's testimony, page 115. It therefore appears by this testimony that all of the lines from the East connect with the Union Pacific tracks in Council Bluffs, and all of the lines from the West connect with the Union Pacific tracks at or near South Omaha, leaving the intervening space, over which all of these lines of railway run their trains, in whole or in part, as we shall show by the testimony. These connections are shown not only by the maps, but by the testimony of Augustus Schermerhorn, page 107, *et seq.*; John B. Berry, page 84, *et seq.*; Horace G. Burt, page 9, *et seq.*

How Pacific Companies have treated this link.

The next question of fact is—what has the Union Pacific Company done in carrying out this Act of Congress and the Saunders deed? The testimony clearly shows that the First Pacific Company, the Second Pacific Company, and the present company have always allowed all of the railroads reaching the Missouri River at or near Council Bluffs, and at or near Omaha, to use all, or some part, of these tracks over which to run their trains to a connection with

these various lines. They have treated it as a link, or terminal, between the said eastern and western lines. Mr. Burt in his testimony, in connection with the contracts introduced as a part of the testimony of the Auditor, Mr. Bettis, shows the different parts of this link used by the various companies, and the contracts under which such property is used—Record, page 8 and page 21, *et seq.*, as follows:

Rock Island contract.

The Chicago, Rock Island & Pacific contract, dated the first day of May, 1890, for the term of 999 years, attached to Bill of Complaint, Exhibit 4, page 121. It is admitted that the Union Pacific Railway Company refused to carry out this contract, that suit was brought to compel the enforcement of the same, and that judgment was finally rendered in the Supreme Court of the United States specifically enforcing the terms of the contract. This company uses the main and passing tracks between the eastern terminus of the Union Pacific Railroad in the City of Council Bluffs, and a line drawn at right angles across said tracks within one and one-half miles southerly from the present passenger station at South Omaha.

Milwaukee contract.

The Chicago, Milwaukee & St. Paul Railway Company made a contract for the use of the same property dated at the same time, for the term of 999

years, Complainant's Exhibit 5, attached to the Bill of Complaint, page 161; it uses identically the same property — Testimony of Burt, Record page 13. Subsequently, and on May 26th, 1898, Record, page 23, the present defendant company entered into a new contract with the Chicago, Milwaukee & St. Paul Railway Company, for the use of the same property for the term of 999 years on identically the same terms, with the exception that the Milwaukee Company agreed to pay its proportion of interest at four per cent for any extraordinary improvements upon or across roadways or tracks ordered by the City authorities.

Northwestern contract.

On or about May 26th, 1898, the Chicago & Northwestern Railway Company entered into a contract with the Union Pacific Company exactly like the last Milwaukee contract for the term of 999 years for the use of the same property, and on identically the same terms—Testimony of Burt, page 16; Contract, Record, page 31.

Missouri Pacific contract.

It is unnecessary to go into the details of all of the other contracts. It is sufficient to say that the Missouri Pacific Company uses the tracks of the Union Pacific Company for its passenger trains from its connection near Gilmore to the Union Depot in Omaha, and for its freight trains from its connection

near Gilmore, to a connection with the Belt Line near the north edge of the corporation limits of South Omaha—Record, page 13.

C., B. & Q. contract.

The Chicago, Burlington & Quincy Railway Company runs its passenger trains from the eastern terminus of the Union Pacific Railroad Company across the Union Pacific bridge, to a connection with the depot of the Burlington Company in Omaha; and the Kansas City, St. Joe & Council Bluffs trains use the same property—Burt's Testimony, Record, page 15. The Burlington Company also uses that part of the Union Pacific tracks from the junction near Gilmore, for its freight and passenger trains, to a junction with the Stock Yards Company lines near the passenger depot in South Omaha — Testimony of Schermerhorn, Record, page 109.

Illinois Central contract.

The Illinois Central Railroad Company runs its trains over the Terminal line, connects with the Union Pacific in North Omaha, and runs its passenger trains into and out of the Union Depot over the Union Pacific tracks. All of these roads pull their trains with their own engines—Burt's Testimony, Record, page 16.

Union Depot contract.

It is alleged in the bill, and admitted in the answer, that in September, 1898, the Third Pacific Company entered into a Union Depot contract with the

Chicago & Northwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, which contract is attached to the Bill of Complaint, Exhibit No. 6, page 173; Answer page 23.

Supplemental Union Depot contract.

There is a supplemental contract, Exhibit No. 7, page 200. By these contracts the Company carved out a Union Depot and grounds, situated principally upon the property deeded in the Saunders deed. See maps attached to Exhibits Nos. 6 and 7; see also Complainant's Exhibit 4a—property within the yellow lines—Testimony of Berry, Record, pages 83 and 84. By this contract it is specifically stated the terms and conditions on which all of the Companies have the right to use the tracks and depot. Article 14 of the contract, Bill of Complaint, page 193, is as follows:

> "It is agreed that the following named Companies shall be admitted to a joint use of said depot and appurtenances, in case they or either of them shall so desire, and shall become a party to this agreement by subscribing to the copy of the same which shall be in the possession of each of the parties hereto:
>
> Missouri Pacific Railway Company; Fremont, Elkhorn & Missouri Valley Railroad

Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Illinois Central Railroad Company; The Wabash Railroad Company, and the Omaha & St. Louis Railroad Company; also that any other Railroad Companies, by and with the consent of the party of the first part, and upon like subscription to the copy of this agreement in the possession of the parties hereto as aforesaid, shall be admitted into said depot. In case of the admission of any Company or Companies as herein provided, the basis of fixed compensation shall be changed so that the same shall be borne equally by all the Companies using said depot; and the cost of operation and maintenance shall be borne on the basis hereinbefore provided. It being also understood that in the event of admission of any Company as a party to this agreement as herein provided the duties and privileges of such Company shall be precisely as are herein defined in respect to the second, third and fourth parties."

Construction, extension, and enlargement of U. P. Co.'s tracks, bridge, and facilities through Omaha to Gilmore.

It appears by the testimony in this case, and by the admissions in the answer, that originally the Union Pacific Railroad Company constructed a sin-

gle track railway from section 10, down through the City of Omaha, substantially where the present track is located, and through what is now South Omaha, and that in 1871, under the Bridge Act, it constructed the bridge and the line from the eastern terminus at Council Bluffs, to Bridge Junction, which is about Twentieth Street in Omaha. The east approach of the bridge extends from the Union Pacific transfer station in Council Bluffs, where the Mason City Company connects with it, to the bridge proper. Nearly all of this approach is constructed on a high embankment, which, at the end of the bridge, is approximately fifty feet; a mile east, it is substantially twenty feet; and gradually descending until it strikes substantially the level of the country, at the connection. Record, Vol. 1, pages 148 and 149.

The stock yards were established at South Omaha about 1883 or 1884—Testimony of Schermerhorn, Record page 97, and of Scott King, Record page 136; after the establishment of the stock yards the Union Pacific Company constructed a second track, or double track, from the Union Pacific station, about where it is now located, south, passing Twentieth Street to the summit, which is at about the crossing of the Burlington line—Record, pages 97-106; about 1884 it extended this a short distance

below the South Omaha station, and about 1890 it was extended to Gilmore, which still is the end of the double track, the line beyond that being a single track road. It appears that the bridge was re-constructed, and a double track laid thereon, in 1885 or 1886—Record, page 96-97. The other tracks were added from time to time as the business of the Company demanded—Answer, page 7. There are two main tracks, therefore, extending from the eastern terminus to Gilmore, and various side tracks, used for switching purposes and storage of cars—Testimony of Schermerhorn, Record, page 99. It also appears in this case that from the eastern terminus of the line in Council Bluffs to Gilmore, where the double tracks end, is a yard, or terminal, and that it is operated as such—Testimony of Schermerhorn, Record, page 100. We introduced in evidence the time table of the defendant Company, Record, page 109, in which this is called the "Bridge District," and shows that it is operated as a yard or terminal, the trains of all roads running over it, not on regular time, but as the business demands, and with their own engines, to be sure, under rules and regulations, as all roads are operated. It therefore appears that these tracks have been constructed and extended from Twentieth Street to South Omaha as the cities

Council Bluffs to Gilmore, a terminal.

South main track an extension of bridge track.

grew, and as the business grew, for the purpose of connecting the lines reaching South Omaha with the lines to the East. Schermerhorn's testimony shows that the south main track was purely an extension of the bridge track, and whether it was or not, these tracks are the ones that are necessary for any company to use to connect with the roads ending at South Omaha.

Population of cities; practically one city.

It appears also by the testimony that Omaha is a city of about 125,000 people; that South Omaha has about 26,000 people; that the two cities are connected by the same street railways, gas and electric lines and water pipes; that the streets are continuous between the two cities; that they are practically one city, although separate corporate entities; and that South Omaha has an enormous business, employing about twenty-five per cent. of the wage earners of the State of Nebraska—Testimony of Kenyon, Record, page 121. It therefore appears that so far as the business is concerned it is a part of the City of Omaha.

Description of country between Omaha and So. Omaha.

It further appears by the topographical maps introduced in evidence, Complainant's Exhibit 7 and 8, that from the Union Depot in Omaha to South Omaha the Union Pacific line runs most of the way through a narrow valley with steep hills on each side;

that through this narrow space the Union Pacific and Burlington roads have constructed lines which practically fill all the space, and that it is not possible to build another line between Omaha and South Omaha, paralleling the Union Pacific and Burlington lines. The testimony also shows that the Union Pacific line, with its depot, runs through the very heart of the city of Omaha, and that on each side it is lined with large business blocks and dwelling houses—See photographs, Record, page 143, testimony of George W. Craig, page 121, *et seq.*, and page 134; of A. B. Stickney, page 388, *et seq.*

Negotiations with Burt for use of terminals.

It further appears that the proposition for the complainant company to use the Union Pacific Company's bridge, depot and tracks from Council Bluffs to South Omaha was made by Mr. Burt, President of the Union Pacific Company, who furnished the complainant a plan of connection in Council Bluffs, being the plan adopted by the court in the decree. —Complainant's Exhibit 4a, Record, pages 373 and 374; and that the Union Pacific Company never refused to allow the complainant to use the tracks until October 28, 1902. The testimony in this regard is substantially as follows:

Mr. Samuel C. Stickney went to Omaha to see Mr. Burt and asked him if he could make arrange-

ents to use the Union Pacific passenger depot in maha. He was then negotiating for the use of the ridge and terminals of the Omaha Bridge & Terinal Company. Mr. Burt said he did not wish any ore roads to enter by that route, as the Illinois entral Company did, as it was awkward and caused onfusion in the place, and he asked Mr. Stickney hy he did not use the Union Pacific bridge and racks all the way through the same as the Chicago, Milwaukee & St. Paul and the Chicago, Rock Island & Pacific Companies. Mr. Stickney asked him on what terms we could use the terminals, and Mr. Burt said that we could do so on exactly the same terms as the other roads, namely, $45,000 a year, and our share of certain expenses, which he could tell him more about in detail if he was interested. He then explained at some length what the arrangements were for handling the trains, and sent for the Auditor, who furnished Mr. Stickney with a detailed statement of the cost,—Record, pp. 365-6.

Thereupon Mr. Stickney wrote out a memorandum proposition for Mr. Burt to make, and left a copy of it with Mr. Burt. He produced the original memorandum in court, and the same is found on page 367, Record. Mr. Burt said in substance that the contract would have to be authorized by the Exec-

utive Committee, but that he would recommend it, because he thought it was for the interest of the Union Pacific Company to make the contract,—Record, p. 368.

On January 16th Mr. Stickney wrote to Mr. Burt a letter (Record, p. 369) asking him if he had taken the matter up with the Executive Committee. On January 31, 1902, Mr. Burt wrote Mr. Stickney in substance requesting him to wait until the complainant's road was well under way, or until the complainant could fix a definite time for its completion, which Mr. Stickney assented to,—Record, pp. 370-1; Mr. Burt furnished him a map showing the proper connection, and the Mason City Company constructed its line to the said connection.—See Exhibit 4a, map in evidence.

Mr. A. B. Stickney's testimony will be found on pp. 388 *et seq.* On this subject he testified in substance that in June, 1902, he called upon Mr. Burt with Mr. Samuel C. Stickney, the General Manager. His testimony is as follows—Record, page 393:

> "Mr. Baldwin: June, 1902, was the time of the conference between you and Mr. Burt.
>
> "A. (Continued.) Yes, June, 1902, I was down here with the General Manager of our company, and we called upon Mr. Burt,

and I said to Mr. Burt—but Mr. Burt in his previous conversation with the General Manager—well that is hearsay, and I didn't hear him say it—I said to Mr. Burt that we had progressed so far with the construction of the Mason City & Fort Dodge road that there could no longer be any reasonable doubt but what we were going to build it, and I asked him if he was still of the same opinion that the Union Pacific would like to, or would be willing to, make an arrangement with us to use their lines, their bridge and lines to South Omaha, and such facilities as they granted other railroads here. Mr. Burt said that as far as he was concerned he thought it would be for the interest of the Union Pacific to do it, and that while he had no authority to make a contract of that kind, he would be very glad to take the matter up with his people in New York, and he thought there was no doubt but what they would be willing to make the arrangement. I asked him if he would take the matter up at once and give us an early reply, and he said he would. I asked if he would like to have me take the matter up directly with his people in New York. Well, he said

he had no objections to that, but he thought it was unnecessary. The matter ran along for several months, for some time at least, and not hearing anything from it, I called upon Mr. Harriman one day."

Negotiations with Harriman.

He further testified, in substance, that he saw Mr. Harriman in New York, who said the fault was his rather than Mr. Burt's; that he had been so busy with other matters that he had not had time to give the matter consideration, and said that he would take the matter up. Mr. Stickney then turned the negotiations over to Mr. Kellogg, who, through Mr. Pierce, General Counsel of the Company, had the matter up with Mr. Harriman, and the negotiations ran along until about the 28th day of October, 1902. —Record, page 395. Neither Mr. Harriman nor any other officer of the company made any suggestion that the company would not make such a contract as proposed by Mr. Burt until about the 31st day of October, 1902, when Mr. Harriman sent for Mr. Stickney. Mr. Stickney's testimony on that point is as follows:

"The negotiations ran along in that way until about the time this suit was commenced, about the 31st day of October, 1902. Mr. Kellogg had an appointment with Mr. Harriman,

and Mr. Harriman was to notify him at my office. We waited until long after the hour and no answer came, and finally I said to Mr. Kellogg, 'Go out to Omaha and commence that suit.' After Mr. Kellogg left the office to go to the hotel and to his train, a boy came in and said Mr. Harriman would see Mr. Kellogg then, if he would come over to his office. I went over—Mr. Kellogg wasn't there—to see Mr. Harriman. We talked the matter over, and Mr. Harriman said, 'We have got plenty of room; we have got plenty of facilities to do your business there.' Said he, 'There is no objection on that account at all.' But he says, 'Stickney, I understand you are planning to build a road west of the Missouri river.' I told him no, there were no such plans at that time. Our plans were to build to Omaha, but whether we ever went any further west would probably depend on how well we were treated by the western roads. But at the present there was no plan for going any further than Omaha. 'Well,' he said, 'I think the Union Pacific would be willing to make a contract with you to use the bridge and facilities there as far as South Omaha on the same terms that

the Chicago, Milwaukee & St. Paul have for them, provided that the contract shall terminate whenever you undertake to start west of South Omaha with a road.' 'Well,' I says, 'Mr. Harriman, I have been trying to get at you for two or three months here, standing around and waiting for a month at a time with no other business except to see you, and I have been unable to see you; now are you prepared to say that the Union Pacific will make such a contract, and are you prepared to make such a contract?' Well, he said he wasn't prepared to make such a contract, but he thought probably the Union Pacific would make that kind of a contract. 'Well,' said I, 'I understand, Mr. Harriman, that under the laws, and the contracts that the Union Pacific made with the City of Omaha, etc., that we have a right to the use of that property, the same use that we would get from such a contract, and that our rights would not terminate if in the future we should build a line west from Omaha.' Well, he said he didn't know anything about that, but the Union Pacific wouldn't make any contract with us, except that contract contained an agreement that we should forfeit

our rights in case we started to build west. Well, I then told him that we should commence a suit to assert what we considered to be our rights under the laws, and it didn't seem to scare him a little bit."

earing was had before Judge Munger, who written opinion, Transcript of Record, p. 252; final decree was entered on August 12, 1903, ng the complainant the use of the main and g tracks from Council Bluffs to a connection he Union Stock Yards Railroad, and the other ads connecting with the Union Pacific Railroad, th Omaha, in the State of Nebraska, including idge, and the Union Depot in Omaha, on the terms and conditions the same is used by the railroad companies, as appears from the con- in evidence, as follows, to-wit:

Decree of Circuit Court.

Rock Island Contract, dated May 1, 1890, Exhibit 4, Bill of Complaint, page 121;

Milwaukee contract, same date, Exhibit 5, Bill of Complaint, page 161;

New Milwaukee Contract, dated June 10, 1898, Record, page 23;

Northwestern Contract, dated June 14, 1898, Record, page 31;

Union Depot Contracts. Exhibits 6 and 7, with all the companies, dated September, 1898, and August 1, 1899, respectively, Bill of Complaint, pages 173 to 207.

An appeal allowed, but stay of injunction refused.

Judge Munger allowed an appeal, but refused to grant a stay of the mandatory injunction, and the Mason City Company immediately thereafter commenced to run its trains over the tracks and use the Union passenger station of the Pacific Company, under the terms of the decree, and has ever since used the same under the same terms and conditions as the other companies.

Decision of the Court of Appeals.

On an appeal the case was heard before Judges Sanborn, Van Devanter and Hook, and on February 29, 1904, an opinion was filed and a decree entered affirming the decree of the court below. This opinion is found on pages 278 to 293 of the volume of the record marked "Pleadings and Orders."

I.

Decree of court below should be affirmed.

Upon the foregoing state of facts we believe the decree of the Court below should be affirmed. This decree granted the Mason City and Fort Dodge Railroad Company the right to use the Union Pacific Bridge, its approaches, depots and tracks connected therewith between the terminus of the Union Pacific road in Council Bluffs, Iowa, and South Omaha, Nebraska, being the same property used by the other railroad companies, for the purpose of connecting the lines of railroad reaching Council Bluffs on the east with the lines of railroad reaching Omaha on the west.

Authorities.

Opinion of Judge Munger, Volume 3, Record, page 252;

Opinion Circuit Court of Appeals, Volume 3, p. 277;

Union Pacific R'y Co. v. C. R. I. & P. R. R. Co., 163 U. S. 564;

Same case in Circuit Court of Appeals, 51 Fed. 309;

Same case in Circuit Court, 47 Federal, 15;

Union Pacific R. R. Co. v. Hall, 91 U. S. 343;
United States v. Union Pacific R'y Co., 91 U. S. 72;
United States v. Union Pacific R'y Co., 117 U. S. 361;
Opinion of George H. Williams, Attorney General, 14 Opinions of Attorney General, 232, 235.

Claims of Mason City Co. under Acts 1866, 1871, and tripartite agreement.

We claimed the right to use this property on the same terms and conditions as the same is used by all the other railroad companies reaching Council Bluffs on the east, and South Omaha on the west, under the Act of 1866 and 1871, under which the said bridge, approaches, depots and tracks were constructed. We also claimed the same right under a tripartite agreement entered into between the county of Douglas, the city of Omaha, and the First Pacific Company, on January 1st, 1872, by which agreement, in consideration of donations by the city and county of property and bonds amounting to $450,000, the railroad company, its successors and assigns, agreed to arrange for the more perfect connection of any railroads that then were, or might thereafter be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska, and for said purpose the trains of the railroads running into or

out of Omaha and Council Bluffs, should have unobstructed access to and over said bridge and its approaches, with their trains, engines and cars, without discrimination, hindrance, preference or delay.

Union Pacific v. Rock Island and Milwaukee Companies.

The case of the Union Pacific R'y Co. v. the Rock Island and Milwaukee Companies, 163 U. S. 564, disposes of every question involved in this case under the Acts of Congress aforesaid, except the question of whether the obligations of said acts are binding upon the present Pacific Company, which acquired the railroad by a foreclosure of the mortgage of the First Pacific Company. The principal contention of the appellant in the court below was that this decision was erroneous, that the language of the court was *obiter dictum* and was therefore not binding upon the courts below. We presume those arguments will be again repeated, and that this court will be asked to overrule that decision which for nearly ten years has stood unquestioned, and has become a rule of property governing the use of the bridge and tracks of the Union Pacific road. Under that decision the trains of substantially all the railroads except the Mason City & Fort Dodge Co. reaching Council Bluffs and South Omaha, enjoy the use of the bridge, depots and tracks connected therewith, for the purpose of making connection between the east-

ern and western lines. The strenuous insistence of counsel who represented the Union Pacific Company in the courts below, is our only excuse for again presenting to this court the arguments which were so ably presented in the Rock Island case. Before, however, presenting these considerations, we desire to state the history and substance of that decision.

Discussion of the *Rock Island* case.

The case was first decided by Judge Brewer at Circuit, 47 Fed., page 15; next by Judges Caldwell, Sanborn and Shiras in the Court of Appeals—opinion written by Judge Sanborn—51 Fed., page 309; next by the Supreme Court of the United States, 163 U. S., page 566. The case was elaborately argued by most eminent counsel, and received the most careful consideration by the distinguished jurists who passed upon it. The questions involved were as follows:

On May 1, 1890, the Second Pacific Company entered into a contract with the Rock Island Company, and on April 30th of the same year, so far as the property in question was concerned, entered into a like contract with the Milwaukee Company. These contracts were for the use of the identical property covered by the decree of Judge Munger. Before these railway companies commenced the use of the property, there was a change of management of the Pacific Company, and it refused to carry out

the contracts. Suit was brought by the Rock Island and Milwaukee Companies to enforce specific performance. The Union Pacific Company claimed several defenses, but the main claim was that its charter did not authorize it to enter into such a lease, or contract, and that for want of power the same was void. It was admitted in the briefs of counsel that there was no specific grant of authority for the Union Pacific Company to lease its railroad, or any part thereof, and the well established rule was invoked that there must be special authority granted for such purpose. Judge Sanborn proceeded to consider the question upon the ground of implied authority. In discussing the rule of law that no railroad company had a right to transfer its property for a long term of years, and thus disable itself from performing its obligations to the Government and the Public, he said:

Judge Sanborn's opinion.

"Clearly, the contract here in question does not come under the ban of these decisions. So far as the main line of the Pacific Company's road from Council Bluffs to Ogden is concerned, this contract covers but about seven miles of double track on a line of 1,032 miles, part of a system of over 5,000 miles of railroad operated by this company. These tracks are

at one of its terminals, at the junction of thr
great systems of railroad, aggregating mo
than 14,000 miles in extent, at the crossing
the Missouri River where three large citi
stand. Courts cannot be blind to the fact th
every railroad company cannot have entran
to our great cities over tracks of its own, or
the fact that railroad companies do, and eve
public interest requires that they should ma
proper contracts for terminal facilities ov
the roads of each other."

Every railroad cannot have entrance, over tracks of its own.

Passing from this question, Judge Sanborn th
took up the question of the validity of the contra
under the Pacific Railroad Acts. He said:

"There is another ground upon which t
contract must be held to be within the pow
of this corporation."

He then reviewed the charter of the Union P
cific Railroad Company, and the interpretation of t
scheme of Congress, as decided in the case of Ra
road Company v. Hall, 91 U. S., page 345. He quot
at length the Bridge Acts of 1871 and of 1866, a
the Act of June 15, 1866 (14 Stat., 66), creating
railroads post roads, and authorizing them to ca
mails, passengers, troops and government suppl

over bridges, ferries and railroads. Judge Sanborn then said:

The policy of Congress shown.

"An examination of these statutes clearly shows that the purpose and policy of the Congress has been constantly to promote, and often to require, the formation and operation of continuous lines of transportation; that almost without exception it has authorized, and generally has required, the owners of railroad bridges built under its authority to allow the use of their bridges and tracks for the passage of trains of connecting companies. It is seen that the Bridge Act of 1866, by which the Pacific Company, so far as the same was applicable, was 'empowered, governed and limited' for the use and protection of its Omaha bridge, was an act whose restrictions and conditions have been made applicable to at least eight bridges; and that the expressed purpose of the Act of February 24, 1871, was 'for the more perfect connection of any railroads that are or shall be constructed to the Missouri River.'

"*In Union Pacific Railway Co. v. U. S.*, 117 U. S. 355, 361, 6 Sup. Ct. Rep. 772, the Supreme Court, speaking of the Act of 1871, which they there held did not change the rates

of compensation expressly fixed in the Act of 1862 for the transportation of mail, troops and government supplies across the Omaha bridge, said:

" 'The reference in the last-named Act to the Act of 1866 was for the purpose of extending the provisions of the latter Act as far as necessary to confer additional powers upon the railway company for the use and protection of the bridge.'

"In *Pittsburgh, etc., Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. Rep. 770, Mr. Justice Gray, speaking for the court, says:

" 'Where the charter of a railroad corporation, or the general laws applicable to it, manifest the intention of the legislature for the purpose of securing a continuous line of transportation, of which its road forms a part, to confer upon it the power of making contracts with other railroads or steamboat corporations to promote that end, such contracts are not *ultra vires*.' *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. Rep., 221.

"The great purpose of the contract here in question was to fill the gap in the line of the Rock Island Company between Council Bluffs and Beatrice, and thus establish a continuous line of railroad from Chicago, by the way of Omaha and Beatrice, to Denver, Colorado. It is true that that line would be a competitor of the Pacific Company, but the course of legislation and decision, the public policy of this nation, is to foster, not repress, competition; it is to promote, not to repress, continuous lines of transportation; and, reading the charter of this company in the light of the general legislation to which we have referred, we are constrained to hold that the Union Pacific Railway Company was thereby fairly empowered to make this contract."

The court necessarily passed upon the question involved in this case. It determined that the provisions of the Act of 1866 requiring the use of the bridges authorized by that act to be extended to all railroad companies, were adopted as a part of the Union Pacific Bridge Act of 1871. The only express authority in the charter of the Union Pacific Railroad Company authorizing it to make a contract with the Rock Island and the Milwaukee Companies to run

their trains over the bridge and tracks, was the provisions of the Act of 1866. The provisions of the Act of 1866 made it obligatory upon the Union Pacific Company to allow the Rock Island and Milwaukee Companies to run their trains over the bridge and tracks; it followed therefore, because the company was required to do this, it necessarily had the authority to contract to do it. It had no express authority without holding that the obligation was imposed. If, therefore, the Act of 1866 became a part of the Act of 1871, governing the use of the bridge, it controls this case.

Judge Sanborn reviewed a large number of the statutes of Congress requiring railroad companies to allow the trains of other roads to cross their bridges for reasonable compensation, for the purpose of showing that this was the policy of Congress, and that that policy had been carried forward and applied to the Union Pacific Company by the Act of 1871.

The case was appealed to the Supreme Court of the United States. It was there argued on behalf of the Union Pacific Company by Judge Dillon and Mr. Thurston, on behalf of the Rock Island Company by Mr. Woolworth, and on behalf of the Milwaukee Company by Mr. Peck.

In the Circuit Court of Appeals it was argued by
ne of the same and other equally eminent counsel.
e have had access to the record and the briefs in
ose cases, and invite the court's attention to them.
e questions which were argued by counsel of the
nion Pacific Company in the court below as to the
plicability of the Act of 1866 to the bridge and
acks in question, and as to whether said Acts in-
uded the railroad tracks from Council Bluffs to
outh Omaha were argued *pro* and *con* by the coun-
l in these courts.—See Judge Dillon's Brief, Cir-
it Court App., pp. 43 to 56; In the Supreme Court
the U. S., pp. 40 to 58; also Mr. Woolworth's
rief, Circuit Court App., pp. 27, 28 and 118 to 124;
the Supreme Court of the U. S., pp. 55 to 69.

Calling attention to the brief of Judge Dillon, in
e Supreme Court U. S. p. 51, it will be noted that
e there urges that the Union Pacific Company had
o specific authority unless it is found in the Acts
1871 and 1866. As to the Act of 1866, referred
in the Act of 1871, he said:

> "Even if it did authorize a lease of the bridge, neither it nor any other Act authorizes the Union Pacific to lease the remaining six or seven miles of the ten miles of its railroad which the contract purports to lease,

and therefore on that ground the contract is void."

It was also urged by him that under the decision of the Supreme Court of the United States it was the duty of the Union Pacific Company to operate its road to the eastern terminus at Council Bluffs, citing *Union Pacific Co. v. Hall*, 91 U. S. 345, and *Union Pacific Co. v. United States*, 117 U. S. 355.

Referring to the Act of 1871, it was further urged that the provisions in the Act of 1871 which, in substance, provide that for the use and protection of the bridge and property the Union Pacific Company should be governed by the Act of 1866, referred only to those provisions of Sections 2 and 3 regulating the manner of construction, creating the bridges post routes, and providing for the rates for transportation of mails, etc., over the bridge.

Points urged by counsel for U. P. Co. were covered in Rock Island case in this court.

Every point urged by the counsel for the Union Pacific Company in the Circuit Court of Appeals, in the case at bar, was originally made in the briefs of counsel in the Rock Island case in the Supreme Court of the United States and with great ability and completeness, so that there were no reasons presented to the Court of Appeals against the affirmance of the decree in this case, based upon the obligations imposed by the act of Congress, which were

not equally potent against the decree in the Rock Island case in this court.

The testimony was substantially the same in the two cases. The Saunders deed and the tripartite agreement were in evidence in the Rock Island case, —Record in that case, p. 139,—and it was called to the attention of the court in the briefs.

The opinion was written by Chief Justice Fuller. In opening the discussion he said:

> "And we may remark in the outset that the main contention of the Pacific Company concerns the tracks between Council Bluffs and South Omaha, including the bridge."

The court following the line of argument of Judge Sanborn in the court below, first considered the nature of the agreement, and whether it was valid under the implied powers of the Union Pacific Company. The court held that it was not a lease; that the Union Pacific Company did not give up the possession of this property; that it parted with no franchise; that what it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes; that it did not thereby prevent it from fulfilling its obligations and performing its duties to the public, but simply widened the extent of the use of the property for the

same purpose for which it was acquired in the pursuance of a wise public policy. Among other things, the court said:

"The evidence shows that between the bridge and South Omaha some of the most thickly populated and densely settled portions of the city of Omaha are situated; that five railroads engaged in transcontinental traffic do their terminal business there, taking up and setting down passengers, collecting, unloading and delivering freight; that a large part of the territory is filled with the tracks of the Union Pacific and Burlington companies, and that there is scant room, if any, for another company with the many tracks required for terminal business; that the whole territory is very valuable, densely populated and filled with tracks, and that at South Omaha are stock yards and packing industries of great extent, furnishing the companies a vast volume of freight and compelling the building of many tracks. If it were true that railroad companies could not, ordinarily, without the aid of a statute, grant running facilities over their tracks even when such an arrangement would not interfere with their

Densely settled.

Scant room for another company's tracks.

business, the application of so rigorous a rule to defeat a contract as between the parties, in respect of tracks in the congested parts of large cities, where the entire use of them is not required by their owners, does not seem reasonable. It is well said by Sanborn, J., speaking for the Circuit Court of Appeals: 'Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other.' * * *

Thinks South Omaha was included.

"But the determination of the existence of the power to grant running rights in this instance does not rest on these considerations alone. For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri River, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included.

"The original charter of 1862 required the

construction of the Pacific road from the east bank of the river, and so impliedly authorized the company to bridge it, and the amendatory act of 1864 expressly gave the corporation authority 'to construct bridges over said Missouri River,' the bridge contemplated was for the company's use as a part of its road, and no provision was made for other roads or other business, nor were any special means provided for the construction of the bridge.

"In 1871 several roads had been built from the East to Council Bluffs, and others were building and roads were in process of construction in Nebraska with Omaha as their terminus.

"The Omaha Bridge act of February 24, 1871, c. 67, 16 Stat. 430, was then passed, by which, 'for the more perfect connection of any railroads that are or shall be constructed to the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska,' the company was authorized to issue bonds not exceeding two and one half million dollars, and to 'secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge

over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress.' The bridge was 'to be so constructed as to provide for ordinary vehicles and travel;' and the company was authorized 'to levy and collect tolls for the use of the same.' The act further provided 'for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the act entitled "An act to authorize the construction of certain bridges and to establish them as post roads," approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto.' The act of 1866 thus referred to, 14 Stat. 244, c. 246, is entitled 'An act to authorize the construction of certain bridges and to establish them as post roads.' It authorized the construction of nine different bridges, eight across the Mississippi River and one across the Missouri River. The first bridge provided for was to be constructed at Quincy, Illinois, and by the first section it was made lawful for any person or persons, company or corporation, having authority from the States

of Illinois and Missouri for that purpose, 'to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection with any railroads that are, or shall be constructed to the said river at or opposite said point, and that when constructed the trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge under the limitations and conditions hereinafter provided.'

The common object of these acts discussed.

"The common object of both these acts plainly was the more perfect connection of roads running to the bridges on either side of the river. And this is in harmony with numerous Acts of Congress referred to in the opinion of the Circuit Court of Appeals; Act of February 21, 1868, 15 Stat. 37; Act of May 6, 1870, c. 93, 16 Stat. 121; Act of June 30, 1870, c. 176, 16 Stat. 173; Act of July 1, 1870, c. 195, 16 Stat. 185; Act of March 3, 1871, c. 110, 16 Stat. 473; Joint Resolution of March 3, 1871, No. 48, 16 Stat. 599, and many others, all of them indicating a settled policy that all

structures of this character should allow connecting roads to cross them with their cars, trains and engines. It is said that the reference to the Act of 1866 should be confined to its second and third sections; but as the matters provided for in those sections were fully otherwise covered in the Pacific Railroad Acts, that does not commend itself to us as a reasonable construction. But it is argued that even if the Pacific Company were authorized to grant to the Rock Island Company the right to run its trains with its engines over the bridge, it was not empowered to grant the same rights over the tracks. The evidence shows that the tracks east of the bridge were upon the approach to the structure proper, and it appears from the maps that the depot at the west end of the bridge was more than half a mile distant. The Act of 1871 provided that for the more perfect connection of the roads east of the river with those west of it the company might issue bonds and secure the same by mortgage 'on the bridge and approaches and appurtenances,' and it would seem to be clear that the approaches on the west side, as well as on the east, must be re-

garded as part of the structure. Moreover, the act refers to 'the tracks and depots required to perfect the same.' A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots and other facilities for the public accommodation. And we consider Council Bluffs, Omaha and South Omaha, under the facts, as necessarily embraced in the intention of Congress. It is true that it appears that from the depot to the point in South Omaha where the tracks of the companies connected, is about four miles; but the scheme of Congress was to accomplish the more perfect connection 'at or near Council Bluffs, Iowa, and Omaha, Nebraska,' and we think this distance reasonably within the terms of the Act of 1871, liberally construed, as the act should be.

"The legislation of 1862 and 1864 in respect of the Union Pacific Railway Company was under consideration in *Union Pacific Railway Co. v. Hall*, 91 U. S. 343, 345, and it was said by Mr. Justice Strong: 'The scheme of the act of Congress, then, is very apparent. It was to secure the connection of the main

line, by at least three branches, with the Missouri and Iowa railroads, and with a railroad running eastwardly from Sioux City in Iowa, either through that state or through Minnesota. An observance of this scheme, we think, will aid in considering the inquiry at what place the Act of Congress, and the orders of the President made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of Congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory, and to provide for those connections within those States at points at or near their western boundaries.'

"On June 15, 1866, an act was approved, c. 124, 14 Stat. 66, 'to facilitate commercial, postal and military communication among the several States,' carried forward as section 5258 of the Revised Statutes, which provided that 'every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats,

bridges and ferries, all passengers, troops, government supplies, mails, freights and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination.'

"It is impossible for us to ignore the great policy in favor of continuous lines thus declared by Congress, and that it is in effectuation of that policy that such business arrangements as will make such connections effective are made."

The court closed the opinion with a quotation from the opinion of Mr. Justice Brewer in the court below, in which he said:

"It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all

their obligations, and so make right and justice the measure of all corporate as well as individual action."

It is impossible to add to the statement of the law as contained in the opinions of these two eminent judges.

Opinion not *obiter dictum*.

It is now contended that so much of the opinion o the Chief Justice as holds that the Act of 186 was adopted by and became a part of the Unio Pacific Bridge Act of 1871, and thus impose upon that company and its successors the obli gation to allow all railroads, terminating a Council Bluffs and South Omaha, the use of th bridge, tracks, and approaches, was *obite dictum*, was in error, and should be overruled

We will first consider whether any part of this opinion was *obiter dictum*, and, second, were it now an original question, does the opinion correctly state the principles of law involved?

Question involved in the Rock Island case.

The question involved in the *Rock Island* case was the validity of the contract with the Rock Island and the Milwaukee Companies, granting them the joint and equal right to the use of the bridge, its approaches, the depot and tracks between Council Bluffs and South Omaha. Its validity was assailed by the Union Pacific Company on two grounds: First, for want of implied authority in the railway company to make such a contract; and second, for the want of express authority. Both questions were elaborately argued at the bar, and considered by the

court, and the contract was sustained upon both grounds.

As to express authority.

The only express authority in the charter of the Union Pacific Company was the obligation imposed by the Acts of 1866 and 1871, and because these acts imposed upon the Union Pacific Company the duty of allowing the Rock Island and Milwaukee Companies to run their trains over the bridge and tracks and to use the Union station, therefore it could contract to do so.

Whenever, therefore, any court held that the Union Pacific Company had express authority under these Acts of 1866 and 1871, to grant to any other railway company the right to run its trains over the tracks from Council Bluffs to South Omaha, and to use the bridge and depot, the court necessarily held that the duty was imposed upon the company to do the same thing without a contract. If it had the express power to make a contract as to the tracks between 20th St. and South Omaha, it was because the duty was imposed. It was not contended in the court below that the opinion of the Circuit Court of Appeals written by Judge Sanborn in the *Rock Island* case was *obiter*, and yet of necessity, the question was determined by that court as well as by this court. In the opinion written by Judge Sanborn, he

Was not contended that opinion of Circuit Court of Appeals was *obiter*, yet the question was determined.

held that the obligations of the Act of 1866, to all other companies to use the bridges therein provided for, became a part of the Union Pacific Bridge Act 1871, and imposed like obligations upon the Union Pacific Co. as to the tracks between Council Bluffs and South Omaha, for the purpose of making connections between the various lines of road reaching those points on each side of the river.

By deciding that the Act of 1866 was a part of the Union Pacific charter, the court necessarily decided that the obligations of that Act were imposed upon the Union Pacific Company. That was the principal question argued in the court below and decided by this court in the opinion of the Chief Justice.

In considering the opinion of this court in the *Rock Island* case, Judge Munger states that the opinion goes one step farther than the opinion of the Circuit Court of Appeals, in that the court held that not only was the contract authorized by the Bridge Act of 1871, but the obligation to allow the use of the property was imposed without a contract, and that the latter holding was not necessary to the decision of the case, and was *obiter*. We think this distinction is not warranted. To be sure, the court of appeals did not, in the opinion in that case, in e

press language say that the act made it mandatory upon the Union Pacific to allow such use of its bridge and tracks, but it was the necessary consequence of what was said, and this court did not, in legal effect, go beyond the decision of the court of appeals, nor decide anything that was not the logical consequence of the decision of the court below.

However, Judge Munger, in construing the opinion of this court in the *Rock Island* case, held that it authoritatively decided that the first section of the Act of 1866 was made applicable to the Union Pacific bridge and tracks by the Act of 1871, and hence was to be read into it as a part of that act, and therefore it imposed upon the Union Pacific Company the obligation to allow any railroad company the joint and equal use of the bridge, depot and tracks between Council Bluffs and South Omaha. In explanation of Judge Munger's opinion it is proper to state that, not knowing the arguments which would be advanced by the Union Pacific Company, we did not cite to him the authorities which were presented to the court of appeals, showing that no part of the decision of this court was *obiter dictum*. In the court of appeals it was again urged by counsel for the Union Pacific Company that the decision written by Chief Justice Fuller was mere *obiter*, erroneous and not binding

upon that court. The opinion was written by Ju
Sanborn, and he stated the conclusions with a cl
ness and precision we cannot hope to excel. Rec
Volume 3, pp. 283, et seq.

While he placed the decision on the ground
this court had disposed of the question in the
Island case, and that the decision was not *obiter*,
the reasoning by which he adduced the conclu
that there was express authority for the Rock Is
contract, would fully sustain the appellees' posi
were there no binding decision of this court.
ask the indulgence of the court to consider br
the opinion of the court of appeals. Judge San
said—Record, Vol. 3, page 283:

Opinion by Judge Sanborn in the Court of Appeals.

> * "*It is true that the power to grant the*
> *use of its transportation facilities at Co*
> *Bluffs, Omaha and South Omaha*
> *exist in the Pacific Company without*
> *duty to grant them. But it is also true*
> *the duty could not exist without the*
> *er.* If the duty existed it was imposed by
> Congress which had the authority to grant
> power and the imposition of the duty ne
> sarily carried with it the power to disch
> that duty. The opinion of the Supreme C
> upon the second reason assigned by cou

*The italics are ours.

for the Rock Island Company for the existence in the Pacific Company of the power to make the contract between the companies when analyzed and stated in syllogistic form reads in this way: The Congress of the United States by its act relating to the bridge over the Missouri river imposed upon the Pacific Company the duty of permitting the Rock Island Company to use the bridge and the other transportation facilities of the Pacific Company between Council Bluffs, Omaha and South Omaha. The imposition of this duty necessarily carried with it the grant of the power to discharge it. Therefore, the Pacific Company had the power to make the contract which granted this permission. Now, how can the position be successfully maintained that the decision of the question involved in the major premise of this syllogism was beyond the case under the consideration of the court, or unnecessary to its decision, when a determination that no such duty was imposed would have been fatal to the argument and would necessarily have resulted in the conclusion that no power to make the contract was granted by the act of Congress relating

to the Omaha bridge? No satisfactory a
swer to this question has been made and t
conclusion is inevitable that the considerati
and decision of the question whether or not
was the duty of the Pacific Company under t
act of Congress relative to the Omaha brid
to permit the Rock Island Company to use t
transportation facilities in question was ne
essary to, and determinative of the decisi
that the Pacific Company had the power u
der those acts to grant to the Rock Isla
Company the permission to use them."

This seems to us a demonstration. If the po
tion here stated is correct, the conclusion is inevit
ble that it is the duty of the Union Pacific Compa
to allow the Mason City & Fort Dodge Railroad Co
pany the use of these facilities; and while it was pe
fectly proper and correct to base the decision up
the binding effect of the opinion of this court, t
decisions of the court of appeals seem to us equal
conclusive. But it is urged that because the cou
first decided that the Union Pacific Company h
implied authority, it was unnecessary to decide th
it had express authority, and therefore, that part
the opinion is *obiter*. We have as much right to s
that that part of the opinion which held that the co

pany had implied authority, is *obiter*, as counsel has to say that that part of the opinion which held that the company had express authority, is *obiter*. Neither is correct. (60 Wisconsin, 270.)

The power to contract was expressly involved. It might be sustained upon either of two grounds or both. It was sustained upon both. Each question was involved; each debated, discussed and deliberately decided by the court.

Rock Island not obiter.

It is well settled that where an adjudication is placed upon two or more grounds, the decision of each will be held to be of binding force, and not *obiter*.

Authorities.

R'y Co. v. Schutte, 103 U. S. 118;
Alexander v. Worthington, 5 Md. 489;
Jones v. Habersham, 107 U. S. 179;
Bouchner v. C. M. & N. W. Ry., 60 Wis. 264, 270, 273;
Bouvier's Dictionary, Rawles Revision, pp. 567, 569;
Becker v. Chester, 91 N. W. 100;
Haws v. Contra Costa Water Co., 5 Sawyer, 287;
Brown v. C. & N. W. Ry., 102 Wis. 137-154.

The case of *Railway Companies v. Schutte*, 103 U. S., 118, was a suit brought by the State of Florida

against the Florida Central Railroad Company, alleging default in the payment of interest due on the company's bonds, and seeking to enforce the statutory lien by the sale of the road. The company answered, setting up fraud, the unconstitutionality of the law touching the State Bonds, and urging that the railroad bonds were not a lien. The Supreme Court of the State dismissed the bill because it was not proved that any of the State bonds were in the hands of *bona fide* holders. The authority of the State, however, to exchange the bonds and create a lien was fully argued and considered by the court. Subsequently, and in a suit (not between the same parties) the question came up as to whether the expressions in the opinion of the court as to the statutory lien were *obiter*. The court said:

Railway Cos. v. Schutte, 103 U. S. 118.

> "As to the Florida Central Company, however, the case is different, and it is claimed not only that the statute did not authorize the exchange of the bonds and the creation of the lien, but also that the company did not in its corporate character execute its own bonds or make the exchange.
>
> "As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of

this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no just sense *dictum*. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended."

We especially invite the court's attention to the case of *Buchner v. Milwaukee Company*, 60 Wis., 264, on this subject. In that case a railway company had constructed its lines in front of a lot so as to cut down the natural level of the street. Suit was brought in equity to compel the railway company to condemn that portion of the land constituting one-

half of the highway next to the lot of Buchner, and to ascertain and recover the damages sustained, and for an injunction until the damages were ascertained and paid. The court held that the complainant was entitled to incidental damages caused by reason of the cutting down of that part of the street in front of his lot, but held that he could not maintain the bill in equity, and hence dismissed it, with costs. Subsequently, the railway company undertook to condemn the property, and it was claimed that what the court said about the damages to his lot in the other action was mere *obiter*, because the court had dismissed the bill in equity on the ground that such a bill could not be maintained. The court held to the contrary, and said:

Bouchner v. Milwaukee Co., 60 Wis. 264.

> "The complaint now is, in effect, that it was mere *obiter* to determine the first proposition, by reason of the conclusion reached upon the second proposition. Upon the same theory it would have been mere *obiter* to say anything upon the second proposition, had we determined the first proposition the other way. To confine this court to the consideration of a single proposition, where several are involved and fully discussed by counsel, might at times operate to prolong litigation, increase the

number of appeals, and inflict unnecessary burdens upon both parties and the public, and yet at times it may be highly proper."

Following this decision we call the Court's attention to a very able opinion by Judge Marshall of the Supreme Court of Wisconsin in a later case, Brown v. Chicago Northwestern Railway (supra), 102 Wis., 154-155, in which Judge Marshall stated that a judgment is authority upon all points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching it.

Brown v. C. & N. W. Ry., 102 Wis. 154, 155.

"Nothing is *obiter* strictly so called, except matters not within the questions presented,—mere statements or observations by the judge in writing the opinion, the result of turning aside for the time to some collateral matter by way of illustration."

The Judge quoted with approval the language of an eminent text-writer as follows:

"It is difficult to see why in a philosophical point of view the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them and which were deliberately decided by the court as if the decision

had hung upon but one point," and adds: 'su
dictum, if *dictum* it is, should be regarded
judicial dictum in contradistinction to m
obiter dictum'."

In the case of Alexander v. Worthington, 5 M
489, the court said:

Alexander v. Worthington, 5 Md. 489.

"But we are not aware of the author
which will sustain the position assumed by
Supreme Court, that the unanimous opinion
a State court of the highest appellate juris
tion, directly on a point which is supposed
the court to be presented by the record, a
which is elaborately discussed by the coun
and is investigated with care and solem
delivered by the court, can be disregarded
obiter dictum, merely because it is since
covered that some other point existed
which the judgment rendered might have b
rested. If any such authority exists, it
not been referred to."

That is the exact question at bar. The quest
of the express power of the Union Pacific to ma
the contract was necessarily involved. It was
mitted by the learned counsel on both sides of th
case that there was no express authority for the
contracts, unless it was found in the Acts of 1871 a

1866. Express authority is necessary for a railroad company to lease its railroad or any part thereof. To be sure, the decision that it had implied authority to lease its terminals was sufficient to sustain the ultimate determination of the court, but, it is equally true that the decision that it had express authority was sufficient to sustain its ultimate determination, and the decision of implied authority was equally unnecessary. But, however that may be, each of these questions was elaborately argued at the bar of this court, was considered of sufficient importance to be discussed and decided; the decision was the expression of an opinion of an eminent court, upon a question argued and submitted, expressing views consonant with reason and justice, and should be followed, whether binding or not. (5 Md. 489.) It was in the interest of the public to have the questions settled.

Rock Island decision became a rule of property on which people had a right to rely.

The people who invested their money in the Mason City & Fort Dodge Railroad had a right to rely on this decision of the highest tribunal of the land. The rule was first declared by Judges Caldwell, Sanborn and Shiras in the Circuit Court of Appeals. After an elaborate argument it was deliberately announced as the judgment of this court. Nearly ten years have elapsed, and this decision has

become a rule of property which has been followed by the Union Pacific Railroad Co., and the other lines of road in the use of this bridge and terminals. Not only that, but in the Mason City case, after careful consideration, the decision of this court has been pronounced by the court of appeals as a binding decision conclusive upon the issues of this case. If it is so understood by learned judges and lawyers, certainly the men who constructed the Mason City road and invested their money upon the faith of this decision have a right to rely upon it.

Construction of Mason City road commenced in 1901 and completed in 1903.

The construction of that road was commenced in the spring of 1901 and completed in the summer of 1903. The plans of these constructors contemplated the use of this bridge and terminals under a proposition made by the president of the Union Pacific Co., knowing that the right to use them had been decreed by this court. To now overrule that decision means ruin and bankruptcy to this complainant, and the reversal of a policy that has been of inestimable benefit to the people of Omaha and other places served by this company. Nor can the rule of *ignorantia juris non excusat* apply, for the decision of this court is the law.

The decision in the Rock Island case, construing the Union Pacific Bridge Act, became a rule of property governing the use of the bridge and tracks involved in this case, on which all parties have a right to rely, and it should not now be disturbed.

Decision in *Rock Island* case a rule of property.

Authorities.

Harris v. Jex, 55 N. Y. 421.

Levy v. Nitsche, 40 La. Ann. 500.

Minnesota Co. v. National Co., 3 Wal. 334.

Frank v. Evansville & I. R. Co., 111 Ind. 132.

Hines v. Driver, 89 Ind. 342.

Paulson v. City of Portland, 16 Oregon, 450.

Garth v. Arnold, 115 Fed. C. C. A. 471.

Harris v. Jex, 55 N. Y. 421.

In the case of *Harris v. Jex*, supra, the defendant, Jex, was the owner of land on which a mortgage was in existence made prior to the passage of the legal tender act of Congress of 1862. When the mortgage became due, Jex tendered legal tender notes of the United States in payment thereof, which were refused. At that time, the decision of the Supreme Court of the United States, in *Hepburn v. Griswold*, had been made, which held that the act was unconstitutional as to debts existing at the time the act was passed, and that these debts or contracts must be paid in coin; that Congress could not compel a creditor to accept legal tender notes in payment

thereof. After the tender was made and refused, th
Supreme Court of the United States reversed thi
decision in the case of *Knox v. Lee* (12 Wal. 457
The Supreme Court of New York held that the pa
ties had a right to rely on the decision of the highes
court of the land as it stood at the time the tend
was made. The court said:

"The claim is sought to be justified by th
maxim, *ignorantia juris non excusat*, the rea
son of which is stated by Lord Ellenborough
in *Bilbie v. Lumley* (2 East, 469), to be, tha
otherwise there is no saying to what exten
the ignorance might not be carried, and tha
it would be urged in almost every case. Th
reason of the rule has no application to a cas
like this. The plaintiff had a right to repos
upon the decision of the highest judicial tribu
nal in the land. It was, as applied to the rela
tions between these parties and to this case
the law, and not the mere evidence of the law
Respect for the decisions of courts is a duty
inculcated by writers upon the law, and en
forced by considerations of public policy. I
is said by *Kent* (1 Com., 476): 'If a decisio
has been made upon solemn argument and
mature deliberation, the presumption is i

Had a right to repose upon decision of highest tribunal in the land.

favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.' The transactions of life would be involved in great and distressing perplexity and uncertainty, if the maxim quoted is to be applied and extended to cases like this."

Levy v. Nitsche, 40 La. Ann. 500.

In the case of *Levy v. Nitsche*, supra, the court held that, after the intent and meaning of a law has been settled by judicial construction, such construction becomes a rule of property, so far as relates to contract rights acquired under it, which will not be changed except for the most cogent reasons. The court said:

"Indeed, the jurisprudence of that time constituted a rule of property in which titles to real estate were adjusted, and to disturb it, now that the court on whose order the property was partitioned has ceased to be, would be straining a legal technicality too far, and to no useful purpose. In a recent case, this court said: 'A familiar rule is that judicial construction of statutes becomes incorporated in it.' * * * 'Whatever might be our impression, were the matters *res integra*, we

Judicial construction of statutes becomes incorporated in it.

deem it important, in the construction of statutes, to adhere to whatever has already been adjudged. The judicial interpretation becomes, as it were, a part of the statute, and should not be changed but for the most cogent reasons.'"

Minnesota Co. v. Nat'l Co., 3 Wallace, 334.

The rule is clearly stated by Mr. Justice Grier in the case of Minnesota Company v. National Company, supra.

"Where questions arise which affect titles to land, it is of great importance to the public that, when they are once decided, they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but, where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on

a change of the law when the administrators of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments."

In the case of *Frank v. Evansville & I. R. Co.* supra, the court held that the decisions of the Supreme Court of Indiana, to the effect that by condemnation proceedings the estate taken is a fee instead of an easement, became a rule of property, and should be followed in all cases. The court said:

Frank v. E. & I. R. Co., 111 Ind 132.

"Nearly fifteen years have now elapsed since this court decided, in *Waterworks Co. v. Burkhart* (41 Ind. 364), where lands had been taken and used under the laws which provided for the construction of the Wabash & Erie canal, that the estate so taken in such lands was an estate in fee-simple, and not a mere easement therein. Upon the faith of that decision, we may well suppose that, during those years, large investments have been made in the lands so taken and used for the construction of the Wabash & Erie canal, and to that extent the decision in that case must be regarded as a 'rule of property'."

Paulson v. City of Portland, 16 Oregon, 450.

To the same effect was the case of *Paulso* *City of Portland*, supra. The court held that its vious decisions, construing the charter of the Cit Portland to the effect that a certain notice was necessary in cases of assessments of benefits on p erty incurred in the construction of sewers, w rule of property, although the learned judges considering the subject, believed the rule thus down to be erroneous. The court said:

> "The decision in *Strobridge v. Cit* *Portland* (8 Or. 67) was made nearly years ago. It declared valid the identical vision of the charter of the city which is fore us, and under which all the sewers wi the city have been constructed. Upon faith of that decision, doubtless, the proc ings complained of were instituted, and an penditure of $35,000 incurred in the const tion of the said sewer; and, to overrul under the circumstances, and pronounce an act of the legislature under which the for more than a quarter of a century, has b carrying on extensive operations, would ate confusion and occasion injustice. If rule of *stare decisis* is applicable under circumstances, I think it should certainly

applied in this case. It cannot, it seems to me, be consistently asked of us that we pronounce so important a provision of a city charter void, which this court by a solemn adjudication in a former case has held to be valid, whatever our holding might be if the question were *res integra*."

There is an exceedingly able discussion of this subject in the case of *Wilkins v. Chicago, St. L. & N. O. R. Co.*, in the Supreme Court of Tennessee (75 S. W. 1027). The court quoted with approval the language of Chancellor Kent, as follows:

Wilkins v. C., St. L. & N. O. Ry. Co., 75 S. W. (Tenn.) 1027

"If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and the people in general can venture to buy and trust and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of prosperity."

Income Tax Acts, 158 U. S. 689.

The language of Mr. Justice Brown, in the dissenting opinion in the income tax acts (158 U. S. 689), is exceedingly apposite to the subject under consideration:

> "I have always entertained the view that, in cases turning upon questions of jurisdiction, or involving only the rights of private parties, courts should feel at liberty to settle principles of law according to the opinions of their existing members, neither regardless of, nor implicitly bound by, prior decisions, subject only to the condition that they do not require the disturbance of settled rules of property. There are a vast number of questions, however, which it is more important should be settled in some way than that they should be settled right, and once settled by the solemn adjudication of the court of last resort, the legislature and the people have a right to rely upon such settlement as forever fixing their rights in that connection. Even 'a century of error' may be less pregnant with evil to the State than a long deferred discovery of the truth. I cannot reconcile myself to the idea that adjudications thus solemnly made, usually by a unanimous court, should now be

set aside by reason of a doubt as to the correctness of those adjudications, or because we may suspect that possibly the cases would have been otherwise decided if the court had had before it the wealth of learning which has been brought to bear upon the consideration of this case."

These decisions are particularly applicable to the case at bar. The *Rock Island* case was decided nearly ten years ago. The decision established a rule of property for the government of the use of the Union Pacific bridge and tracks between Council Bluffs and South Omaha. In a matter of great public interest, the court determined that the act of 1866 was a part of the charter of the Union Pacific Company, governing the use of this property, authorizing the Union Pacific Company to contract with other companies to run their trains over the tracks, and to use the bridge and terminals, and imposing a like obligation as to its use for the benefit of all other railroad companies reaching Council Bluffs or South Omaha. Since that time, every railroad company, except the Mason City company, whose lines of road reach South Omaha or Council Bluffs, has made a contract with the Union Pacific company for the use of all, or part, of this property. Suppose, for illus-

tration, this court had not held that there was implied authority for the Rock Island contract, but placed its decision solely upon the ground that there was express authority in the Union Pacific bridge act; would this decision not have had the effect of a rule of property, which the court would feel bound to follow, even though on a subsequent consideration the court should believe its former judgment unwarranted? To reverse the decision would be to destroy the rights of parties, acquired upon the faith of it. Is it less a rule of property because the decision was placed on two grounds? The Mason City company had equal right to rely upon this decision.

So zealous has this court been to maintain the stability of the law that it has refused to follow the highest courts of the States in the construction of their statutes, where, after the issue of negotiable securities, the rules of law pertaining to their validity have been changed by the decisions of the Supreme Court.

Mitchell v. Burlington, 4 Wal. 270.
Gelpcke v. Dubuque, 1 Wal. 202.
Havemeyer v. Iowa, 3 Wal. 294.

Not claimed that *Rock Island* case is not broad enough.

It was not claimed in the court below, and I do not think it will be claimed here, that the decision in the *Rock Island* case is not broad enough to justify

the claim made by the Mason City company, but the claim is that the decision is not binding because it is *obiter dictum*, and, as such *dictum*, it is an erroneous statement of the law. Granting, for the purpose of this argument, that to be the case, it is a statement of the law by the highest court in the land, and the stability of property rights demands that it be adhered to (5 Md. 489).

But considering this as an original proposition, and admitting for the purpose of this argument that the question is not *stare decisis*, the conclusions reached by the Court in the Rock Island case were correct.

The *Rock Island* case is correct on principle.

A brief consideration of the Union Pacific Railroad Acts will clearly show that the intention of Congress by the Bridge Act of 1871 was to provide for a connection of all railroads that then were or might thereafter be constructed to the Missouri River at or near Council Bluffs, Iowa, from the East, with all roads that then were or might thereafter be constructed to the Missouri River at or near Omaha, Nebraska, from the West; and by means of the bridge, depots and intervening tracks connected therewith, to form continuous lines of transportation between two States to the Eastward and Westward thereof.

The original Act of 1862 provided for the construction of one main line and three branches—the main line to commence on the one-hundredth meridian, between the south margin of the valley of the Republican River, and the north margin of the valley of the Platte River, in Nebraska, and to extend westward to a connection with the Central Pacific. The three branches were as follows:

The ninth section authorized the Leavenworth, Pawnee & Western Railroad Company of Kansas to construct a railroad from the Missouri River at the mouth of the Kansas River to the aforesaid point of commencement of the Union Pacific Railroad. This road was changed to the Kansas Pacific, and consolidated with the Union Pacific. It was required to connect with the Pacific Railroad of Missouri, and form a through line to St. Louis.

By the fourteenth section the Union Pacific Company was authorized to construct a line from a point to be fixed by the President on the western boundary of Iowa upon the most direct and practicable route to a connection with the main line at the one-hundredth meridian of longitude.

That whenever a railroad should be built through Minnesota or Iowa to Sioux City, then the said Pacific Company was authorized, and required,

to construct a railroad from Sioux City so as to connect with the second branch aforesaid at some point to be fixed by the President.

Section 15 provided "that any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect its road with the road and branches provided for by this Act at such places, and upon such just and equitable terms, as the President of the United States may prescribe."

At the time this Act of 1862 was passed, there was no railroad constructed to the Missouri River at or near Council Bluffs, but a railroad was in process of construction through the state of Iowa from its eastern border to the Missouri River; and in 1864, in the amendment of the Pacific Railroad Act, it was among other things provided, "that to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River, and other rivers, which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri River, and all other rivers, for the convenience of said road."

By Section 15 of the Act the several companies were required to operate and use their roads as one continuous line, "and to secure equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the business of the roads of either or any of said companies."

On June 15, 1866, an Act was approved, C. 124, 14 Stat. 66, "to facilitate commercial, postal and military communication among the several states," carried forward as Section 5258 of the Revised Statutes, which provided that "every railroad company in the United States, whose road is operated by steam, its successors and assigns be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freights and property on their way from any state to another state, and to receive compensation therefor, **and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination.*"

The great scheme of Congress here laid out was to construct a Pacific railroad from the one-hundredth meridian to the Pacific Ocean, and to connect the east end of that road with three branches—one

*Italics are ours.

from the initial point aforesaid eastward to the mouth of the Kansas River, where it was to connect with a railroad from St. Louis, thus making it a continuous line to the Pacific Ocean; another branch from the initial point aforesaid to a point on the western boundary of the state of Iowa, fixed by the President, where it was to connect with lines from the East, as it was required to do by the fifteenth section of the Act of 1862; and the other branch, when some line was built from Minnesota or Iowa to Sioux City, was to be built from Sioux City to such a point on the second branch aforesaid as should be fixed by the President. The Sioux City & Pacific road was afterwards constructed under this section. And to make the connections more perfect between the Union Pacific and any other lines that should be constructed to the west line of Iowa, and thus make continuous lines of transportation from the East to the Pacific Ocean, Section 9 provided that the Union Pacific Company was authorized to construct a bridge across the Missouri River.

Counsel argues that the act of 1871 was passed simply to allow the Union Pacific Company to make connections at Council Bluffs with lines constructed East. The Union Pacific Company was already authorized to construct a bridge for this purpose; it

was already required by the fifteenth section o
Act of 1862 to connect with all roads.

That the interpretation we give these Acts i
correct one is shown by the opinion of the Sup
Court of the United States in the case of
Pacific Company v. Hall, 91 U. S., pp. 344, 34
346 of the opinion. The court, by Mr. Justice
after stating the substance of the Pacific Rai
Acts substantially as we have done, said:

U. P. Co. v. Hall, 91 U. S. 345, 346.

> "The scheme of the Act of Congress,
> is very apparent. It was to secure the
> nection of the main line, by at least
> branches, with the Missouri and Iowa
> roads, and with a railroad running eastw
> from Sioux City in Iowa, either through
> state or through Minnesota. An obser
> of this scheme, we think, will aid in con
> ing the inquiry at what place the Act of
> gress, and the orders of the President ma
> pursuance thereof, established the easter
> minus of the Iowa branch. From it may
> sonably be inferred that the purpose of
> gress was to provide for the connectio
> the branches of the main line of the
> Pacific road with railroads running th
> the states on the east of the Territory, a

provide for those connections within those states, at points at or near their western boundaries."

Again, the Court said, on page 353:

"To hold that the bridge is not a part of the road would defeat the plain object Congress had in view in 1862 and 1864,—a continuous line for connection with the Iowa roads."

In *United States v. Union Pacific R. R. Co.*, 91 U. S., p. 80, Mr. Justice Davis, speaking for the court, said:

U. S. v. U. P. R. R. Co., 91 U. S. 80.

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and

mineral resources of this territory could
developed, settlements made where set
ments were possible, and thereby the wea
and the power of the United States larg
increased; and there was also the pressi
want, in time of peace even, of an improv
and cheaper method for the transportation
the mails, and of supplies for the army a
the Indians."

We come now to the consideration of the Act
1871. As said by the Supreme Court of the Unit
States in the Rock Island case: "Several roads h
been built from the East to Council Bluffs, and oth
were building, and roads were in process of constr
tion in Nebraska, with Omaha as their terminus
The Union Pacific Company had not commenced
line at a point on the western boundary of Iowa, b
at a point in Section 10, in Omaha, and had built t
road to a connection with the Central Pacific ro
near Ogden, Utah, in May, 1869; but being witho
funds to construct the bridge across the Missou
River to its terminus fixed by President Lincoln,
applied to Congress and procured the passage of t
Act of 1871. The testimony shows, and it is perfe
ly evident, why this application was made. If it h
constructed this part of the road, including t

bridge, under the Acts of 1862 and 1864, it would have received but $16,000 per mile in government bonds, and an equal amount of the first mortgage bonds of the Union Pacific Railroad Company issued under the Act of 1864. As shown by the testimony of General Dodge, it could not build the bridge, depot, terminals, and tracks connected therewith in Omaha and Council Bluffs, with this amount of money. It therefore applied and got authority from Congress to raise money by mortgage, which should take precedence of the government lien, and the first mortgage upon the Union Pacific road. As a matter of fact no subsidy bonds were issued for this part of the Union Pacific line, nor were any bonds issued under the first mortgage for this mileage. For the purpose of constructing the bridge, the depots, and the tracks connected therewith, in Council Bluffs and Omaha, $2,500,000 of bonds were issued, which bonds were sold and the proceeds used in the construction of the line from the eastern terminus to a connection with the main line at or near Twentieth Street in Omaha. This Act of Congress provided:

Act 1871.

* "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, *That for the more perfect connection of any railroads that are*

*All the italics are ours.

or shall be constructed to the Missouri Rive
or near Council Bluffs, Iowa, and Om
Nebraska, the Union Pacific Railroad C
pany be, and it is hereby, authorized to is
such bonds, and secure the same by mortg
on the bridge and approaches and appu
nances, as it may deem needful to constr
and maintain its bridge over said river,
the tracks and depots required to perfect
same, as now authorized by law of Congr
and said bridge may be so constructed a
provide for the passage of ordinary vehi
and travel, and said company may levy
collect tolls and charges for the use of
same; *and for the use and protection of*
bridge and property, the Union Pacific R
road Company shall be empowered, gove
and limited by the provisions of the Act ent
'An act to authorize the construction of
tain bridges, and to establish them as p
roads,' approved July 25, 1866, so far as
same is applicable thereto: And provi
That nothing in this Act shall be so constr
as to change the eastern terminus of the Un
Pacific Railroad from the place where it is
fixed under existing laws, *nor to release*

Union Pacific Railroad Company, or its successors, from its obligations as established by existing laws: Provided, also, That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for. And the amount of bonds herein authorized shall not exceed two and a half million of dollars: Provided, That if said bridge shall be constructed as a draw bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw."

Turning to this Act, it authorized the construction of certain bridges across the Mississippi River at Quincy, Illinois. (14 Stat. 244.) It provides, among other things, as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and

Act 1866.

over said bridge railway tracks, *for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at or opposite said point, shall be allowed to cross said bridge for reasonable compensation*, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided."

This latter act provided for the construction of nine bridges; the first one being the bridge at Quincy, Illinois. The next seven were required to be constructed under the same terms and subject to the same restrictions as to their use by other companies as provided for by the first section above-mentioned. The ninth bridge was across the Mississippi River at St. Louis, to be constructed by the St. Louis & Illinois Bridge Company, and subject to all the conditions contained in the charter of that company, which was granted by the legislatures both of Illinois and Missouri, and required the company to allow the trains of all other companies to run over the bridge. It was strenuously insisted in the court below that the ninth bridge authorized by the eleventh section of the Act of 1866, to-wit, the bridge provided for by the City of St. Louis, was not made subject

to use by other companies, and therefore the Act of 1871 in providing that the use of the Union Pacific bridge should be governed by the provisions of the Act of 1866 could not have had reference to any provisions of that Act which were not applicable to all the bridges authorized thereunder.

We think the argument of little force, but we insisted at the time that counsel was in error, for the reason that under the eleventh section it was provided that the bridge there constructed was to be "subject to all the conditions contained in said act of incorporation and amendments thereto," and that the act of incorporation required its use by other companies. We have since examined this question, and we attach to this brief, as Appendix A, pages 297 to 324, copies of the acts of the legislatures of Illinois and Missouri, together with an explanation thereof, which show that the charter of this Bridge Company contained a clause requiring its use by other companies.

It, therefore, appears that every section of the act of 1866 required the bridges, provided for therein, to be open to the use of all railroad companies.

The policy of Congress, with respect to bridges over important streams, as shown by an

We cite in Appendix B pages 325 to 356 several hundred acts of congress authorizing the construction of bridges across various navigable waters, and

examination of all its bridge acts.

with scarcely an exception they require the said bridges to be open to the use of any other railway companies for the purpose of running their trains over the same. One of said acts, passed Feb. 21, 1868, 15 Stat. 37, authorizes the construction of a bridge across the Mississippi River by the Southern Minnesota Railroad Company, and is made subject to all the terms, conditions, restrictions and requirements of the foregoing Act of July 25, 1866, referred to in the Act of 1871. So that when the Act of 1871 was passed, there were ten bridges authorized by Congress, all of them subject to the same conditions as to use by other companies, imposed upon the Quincy bridge by the first section of the Act of 1866.

We have, therefore, in the Union Pacific Railway acts of 1862 and 1864, as interpreted by the Supreme Court of the United States, the intention of congress of forming through-lines of transportation from the Missouri River to the Pacific Ocean, and connecting those lines of railway with the lines of railway to be constructed to the Missouri River from the East. This policy is clearly expressed, this obligation clearly imposed upon the Union Pacific by the Pacific Railway acts before the enactment of the Act of 1871. It was not at that time seen that railroads would be built to the West beyond the Missis

sippi River in advance of settlement, and therefore, in the Acts of 1862 and 1864, congress did not provide for any connections between any roads except the Pacific roads and those built to the Missouri River from the East.

But shortly after those acts were passed, this railway construction began; the rapid development and extension of western railways was inaugurated, and various lines of railway were extending with great rapidity toward and beyond the Missouri River. It was seen that if every one of these railways should build its own separate bridge across each of the important streams, the navigation of these streams would be seriously endangered. Congress, therefore, had a two-fold problem presented. Its policy was to encourage and foster the multiplication of railway lines from the East to the West, and at the same time to preserve the navigable streams which, up to said time, had been the principal highways of commerce. Congress, therefore, in order at the same time to encourage the construction of railways and to keep the navigable streams as free as possible from obstruction, adopted the policy of providing that whenever a bridge was authorized to be constructed across an important navigable stream, such bridge should be open to the use of all railroads

whose tracks should reach it at either end. B
the passage of the Act of 1871, this policy of
gress had been announced in the Bridge Act of
providing for the construction of nine bridges,
Act of 1868 for the construction of the Sou
Minnesota bridge, and in various other acts p
ing for the construction of bridges, passed be
1866 and 1871. (Appendix pages 325 to 329.)

This history of the Acts of Congress of the
and of the development of railways in relat
these bridges, is important in throwing light
the construction to be placed upon the Act of
As Mr. Justice Davis said, in 91 U. S.:

In construing a statute, courts may recur to the times when it was passed.

> "But courts in construing a statut
> with propriety recur to the history
> times when it was passed, and this is fre
> ly necessary in order to ascertain the
> as well as the meaning of particular pro
> in it."

As said by Mr. Justice Peckham in the
Missouri case:

> "The public policy of the governm
> to be found in its statutes."

This was the condition of the country and
legislation in relation to railway bridges wh

Act of 1871 was passed, and the recitals and provisions of the Act of 1866 are very important in throwing light upon the recitals and provisions of the Act of 1871.

We have seen that each of the sections of that Act, authorizing nine different bridges to be constructed across the Missouri and Mississippi Rivers, should be read as though the declaration of the object of Congress in constructing the bridge and in providing for the use thereof had been written into each separate section. Note the language. It was for the "more perfect connection of any railroads that *are or shall be* constructed to said river at or opposite said point" that the bridge was authorized to be constructed, and that "*all trains of all roads* terminating at said river at or opposite said point shall be allowed to cross said bridge for reasonable compensation to be made to the owners of the bridge."

These nine bridges, therefore, were authorized to be constructed, some by railroad companies and some by bridge companies, for the purpose of making more perfect connections between all railroads reaching opposite banks of the river. Having this in mind, and having in mind the new conditions confronting Congress, it has an important bearing upon the construction to be placed upon the Act of 1871.

The acts embodying these provisions must be given the same construction as the Act of 1866 applied to the nine bridges therein provided for in order to effectuate the objects Congress evidently had in mind.

This also became the general policy of Congress in the construction of nearly every bridge authorized to be built across the navigable waters of the country from that day to the present time.

Provisions of acts of 1866 and 1871, exactly the same.

We come now to the particular provisions of the Act of 1871. We find that this act contains exactly the same recital as does the Act of 1866. The draftsman must have had the latter act before him, for the recital contains the same language. It provides "*that for the more perfect connection of any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be and it is hereby authorized*" etc.; intending, undoubtedly, to accomplish the same object that had been accomplished by Congress in the Act of 1866, and by the many other Acts referred to in the appendix to this brief. Not a connection by the Union Pacific Company with the lines reaching Council Bluffs from the East—this was already provided for by the Acts of 1862 and 1864. It was then known

that railroads were being constructed to Council Bluffs from the East and to Omaha from the West. Congress had in mind a different situation than was in existence in 1862, to-wit, the connections of all these lines of railways by this important link at Omaha.

But it is claimed that the Act of 1871 meant a more perfect connection with the Union Pacific Railroad at Council Bluffs. The Act does not so provide. It provides for the "more perfect connection of all railroads" that then were or "should thereafter be constructed to the Missouri River at or near Council Bluffs" with all railroads that then were "or should thereafter be constructed to the Missouri River at or near Omaha, Nebraska." How the construction of a bridge could aid these railroads to make a connection with each other if they could not use the bridge is more than we can understand. Furthermore, how would the bridge enable the Union Pacific Company to make a more perfect connection with railroads built "to the Missouri River at or near Omaha, Nebraska?" No bridge was necessary for it to connect with such roads. In the court below, the appellant stated its position as follows (page 103 of brief):

Appellant's statement of its position.

"Construing this language 'constructed to the Missouri River at or near Council Bluffs, Iowa, or Omaha, Nebraska,' in connection with the language found in the Act of 1866, it means (if we concede that authority is given to cross) that any road terminating at or near Council Bluffs, Iowa, should have the right to cross the bridge over the Missouri River and enter Omaha, Nebraska. That any road terminating at or near Omaha, Nebraska should have the right to cross the bridge and enter Council Bluffs, Iowa."

This is a most amazing interpretation placed upon this Act to prevent the complainant from going beyond Twentieth Street in Omaha to reach the roads constructed to a place "at or near Omaha," to-wit: South Omaha. If the bridge is the only intervening structure of the Union Pacific road that the other companies have a right to use, then a road constructed to a point "at or near Council Bluffs, Iowa," would have no right to go over the intervening track to reach the bridge; but if it has a right to go over intervening track to reach the bridge, it has a right to go over intervening track beyond the bridge in Omaha sufficient to connect with the lines built to a place "at or near Omaha." This seems to us an ab-

solute demonstration; and the rules of construction which counsel is invoking in this case are too technical to receive the favorable consideration of a court of equity.—*Joy v. St. Louis*, 138 U. S. 1. It, therefore, being the intention of the Act of 1871 to make connections between the Eastern and Western lines, it provided "that for the use and protection of said bridge and property, the Union Pacific Railroad Company shall be empowered, governed and limited by the provisions of the Act of 1866," incorporating therein those provisions, intending to accomplish the same objects as were accomplished by that Act. How could it more appropriately have made the provisions of the Act of 1866 applicable to the bridge, its approaches and tracks connected therewith, than by the use of this language,—in the "use of said property" it was to be "governed by the Act of 1866." Counsel would have this court believe that in view of the fact that the Acts of 1862 and 1864 required the Union Pacific Company to construct a bridge, and make connections at Council Bluffs; in view of the plan of Congress to require all bridges to be used by other companies; in view of its policy, expressed in the Act of 1866, to require the bridge to be used by other companies for the purpose of making connections between the lines reaching opposite banks of

said river—that this provision in the Act of 1871, applying the Act of 1866 to the Union Pacific Bridge, was meant to refer only to those minor provisions of Sections 2 and 3, regulating the manner of construction of the Quincy Bridge.

Let us consider Sections 2 and 3. The first proviso of section 2 may apply only to the bridge at Quincy, but however that may be the second proviso refers to every bridge built under the Act. It provides for a pivot draw bridge, with spans of not less than 150 feet in length on each side of the central or pivot pier of the draw; the next span thereafter to be 250 feet; the height of the spans above the water, and that the spans shall be parallel to the current of the river. The Act of 1871 provided that the spans in the Union Pacific bridge should be 250 feet in the clear on each side of the central or pivot pier of the draw; so that the provisions of Section 2 of the Act of 1866 could not have applied to the Union Pacific bridge. The next provision of Section 2 is, in substance, that the draw shall be opened promptly upon signal for the passage of boats, and that in no case shall unnecessary delay occur in opening the draw during and after the passage of trains. Section 9 of the Act of 1864, applying to the Union Pacific bridge, provides

that the bridge shall be constructed with proper piers for the passage of boats, and that "the same shall be built, kept and maintained at the expense of said company in such a manner as not to impair the use of said river for navigation to any greater extent than such structures of the most approved character necessarily do." So we have a clause in the Acts of 1864 and 1871 specifically providing for the matters covered by Section 2 in the Act of 1866, and providing for them in such a manner as to conflict with the principal provisions of this Act.

Sec. 3, Act of 1866, does not apply to U. P. bridge.

Section 3 evidently was not one of the provisions of the Act of 1866 which Congress intended to apply to the Union Pacific bridge, for the reason that its provisions conflict with the provisions of the Union Pacific charter, or the matters therein are otherwise provided for by the Act of 1871. Section 3 of the Act of 1866 is as follows:

> "That any bridge constructed under this Act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for their trans-

portation over the railroads or public highways leading to the said bridge."

This did not apply, because the Union Pacific Act—Section 6—specifically provided what the rate of transportation should be, and created the bridge a post route; and it has been so held by the Supreme Court of the United States. In the cases of the *Union Pacific Railroad Company v. United States*, 104 U. S. 666, and *Union Pacific Railroad Company v. United States*, 117 U. S. 355, it was held that this provision of Section 3 as to post routes, "upon which, also, no higher charge shall be made for the transmission of mails," etc., than on other roads leading to the Quincy, or other bridges, did not apply to the Union Pacific Bridge, for the reason that the provisions of the Pacific Act of 1862, Section 6, providing in substance that the Government was to have the use of the road for *reasonable compensation*, not exceeding the amount paid for the same kind of service, applied to the bridge, and was a contract between the Government and the Union Pacific Company. We have, therefore, the decision of the Supreme Court of the United States that this provision of the Act of 1866 was not one of the provisions governing the use of the Union Pacific Bridge referred to in the Act of 1871, and presumably, the Union Pacific Com-

pany insisted upon this construction. It now insists on a contrary construction. But great stress is laid in the argument upon the fact that this third section of the Act of 1866, creates the bridge a post route. The Union Pacific Railroad Acts created it a post route, and provided for the rate for carrying "mails, troops and munitions of war over the same"—Section 6, Act of 1862. It also required that the whole line should be operated, so far as the public and the government were concerned, as one connected, continuous line. But the counsel says that at that time it was contended by able lawyers, and by the dissenting opinion of the Supreme Court of the United States, that the bridge was not a part of the Union Pacific Railroad—*Hall v. Union Pacific Company*, 91 U. S. 343.

It is strange that if this provision in the Act of 1866—Section 3—creating the Quincy bridge a post route was of such great importance, and was the principal thing referred to in the Act of 1871, that the Supreme Court of the United States, and the able counsel who represented the Union Pacific Company, and the Government, in that case did not discover it —for this provision is not mentioned as one of the reasons for holding the bridge a part of the Union Pacific line; but the case was decided upon the

ground that the Union Pacific Company was required to build its line to a point fixed by the President, on the western boundary of the State of Iowa. Furthermore, prior to the passage of the Act of 1871, there was a General Act of Congress (14 Stat. 66, Revised Statutes, 5258), constituting all railroads, railroad bridges and ferries post routes. It will also be noted that the Bridge Act of 1871 provided that the company might levy tolls and charges for the use of the bridge, and that the Government should always have power to regulate the same. This, therefore, must be held to be exclusive of the provisions of Section 3, of the Act of 1866. It, therefore, appears that every provision in Sections 2 and 3, regulating the bridge, were otherwise provided for by the Pacific Acts. On principle, therefore, in the absence of any decision, it seems to us trivial to claim that in this most important declaration in the Act of 1871 all that Congress had in mind was the manner of constructing the bridge — that it should be a lawful structure, and be a post route, and regulating the charges for the "transmission of mails, troops," etc., when all of these things were otherwise provided for by the Pacific Acts.

The tripartite agreement gave the complainant the right to use the bridge and the tracks connected therewith, and is also valuable as an interpretation of the meaning of the Act of Congress of 1871.

Tripartite agreement as an interpretation of the act of 1871.

All doubt as to the meaning of the Act of Congress, as it was understood by the people, by the Congress, and by the Union Pacific Company, at the time, is removed when we come to consider the tripartite agreement. It appears by the record in this case that the County of Douglas voted $250,000 of bonds, and donated the bonds to the Union Pacific Company, for the purpose of constructing a bridge, depot, and tracks connected therewith; that the people of that county were anxious to have the bridge constructed at Omaha instead of some miles below; that railroads had been constructed, and were being constructed, to the Missouri River at Council Bluffs, and at Omaha, Nebraska. The resolution submitting the proposition to the electors, provided as follows—Record, page 267:

As provided by the County in donating its $250,000 of bonds;

> "Shall the County of Douglas, for the purpose of securing the location and aiding in the construction of a railroad bridge across the Missouri River, between the Union Pacific Railroad, and such other roads as may seek a connection therewith at Omaha City in said

county, contribute thereto in county bonds the sum of $250,000?" etc.

by the City, in donating its $200,000 of bonds.

It appears, also, that the City voted $200,000 of bonds, and that the proceeds were used to purchase real estate for bridge purposes and depot grounds, and this property was deeded to the Union Pacific Company upon the covenants and conditions stated in an agreement entered into between the Union Pacific Company, the County of Douglas, and the City of Omaha.—See bill of complaint, p. 22.

Now, let us see what the object was which the people of that City and County undertook to accomplish. The party who drew that contract had the Act of Congress of 1871 before him, because the recital in the contract is copied *verbatim et literatim* from the Act of Congress. The contract recites that—Bill of Complaint, page 22; Record, page 21:

> "Whereas, the parties hereunto desire to arrange for the more perfect connection of any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska."

To carry out this declaration of the object of making this contract, and these donations of bonds and money, what did the Union Pacific Company contract to do? Turning to Subdivision 6, we find the following:

"Sixth. That under proper rules for their regulation to be prescribed by said party of the first part, the trains, cars and engines of all railroads, now or hereafter running into or out of Omaha and Council Bluffs, shall have unobstructed access and transit to and over said Bridge and its approaches, and such roads shall have the right to take, or cause to be taken, their trains, cars and engines, with their freight and passengers, over and across said bridge and its approaches, at reasonable compensation without discrimination, hindrance, preference or delay."

What the Union Pac. Co. agreed to do.

At that time the people of Omaha and County of Douglas knew that railway lines were being constructed to Council Bluffs from the East, and to, or near Omaha from the West. They wished to create Omaha the crossing, and the gateway, through which the commerce of the United States would flow to the great undeveloped territory lying beyond the Missouri River. They stated their objects in the recitals in the tripartite agreement; they voted a large sum of money to carry out these objects. Now, we are told that in any event only the bridge was referred to, or if more than the bridge, only to Twentieth Street in Omaha.

This contract and the Act of Congress must be liberally construed, and we must look at both, and to the circumstances and conditions surrounding the situation, in order to arrive at what was intended by the parties. Taking the recitals, and subdivision 6 together, they provided, in substance, that for the purpose of connecting any railroads that then were, or thereafter should be, constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska, the trains, cars and engines of all said railroads then, or thereafter, running into Omaha and Council Bluffs, should have unobstructed access to and over said bridge, and its approaches, and that they should have the right to take their trains, cars and engines over the same without "discrimination, hindrance, preference or delay;" that the object was to form a connection upon the said transfer grounds between all roads which then, or might thereafter, begin or end in Omaha and Council Bluffs, or pass through Omaha and Council Bluffs. Furthermore, the language is "Unobstructed access and transit *to* and over said bridge, and its approaches,"—not over the bridge alone, but *to* the bridge for the purpose of making connections between the various lines of road. So, too, the Act of 1871, as the court has already held, must be construed liberally, and in the

light of the objects to be accomplished, and the circumstances as they existed at that time. The use of the bridge was not alone provided for, but the use of the depots and tracks connected therewith necessary to carry out the intention of Congress, to-wit, so much of said property as was necessary to make connections between the railroads then, or thereafter, constructed to the river at or near Council Bluffs and Omaha. It was not merely the bridge, constructed under the Act of 1871, that was to be used; but the use of the bridge *and property*, was to be "governed" by the Act of 1866. What bridge and property? The bridge and property necessary to make connections between the Eastern and Western lines.

It is not denied that if the Act of 1866 applies, the use of the property granted was not for a less amount than was mortgaged under the Act of 1871. This would include the property to Twentieth Street, and the depots and tracks connected therewith. But it is not limited to this. The Act is to have a liberal construction for the purposes of making the connections, and the complainant has a right to use whatever tracks connected with the bridge are necessary to make the connections between it and the other lines. By accepting the terms of this Act, and accepting the donation from the City

under the covenants of the tripartite agreement, the Union Pacific Company, and its successors, agreed with the people of Omaha and the County of Douglas that any company might have the use of so much of the property as was necessary to make these connections between the different lines of road.

Counsel contends that line constructed to South Omaha is not to the Missouri river.

But it is claimed that a line constructed to South Omaha is not constructed to the Missouri River, and that South Omaha was not in existence when this Act was passed and the tripartite agreement made. This is a narrow construction. The people were not contracting for the benefit of a City as it then existed, but for the future. Omaha was expected to grow, and "to the Missouri River at or near Omaha" must have a reasonable and liberal construction. South Omaha is as near the Missouri River as the tracks of the lines converging at Council Bluffs, and yet counsel makes no question that the complainant has a right to run over these tracks—if it has a right to run over the bridge. Of what benefit would it have been to the citizens of Omaha to contract that any railroad company might run its trains over this bridge without the use of the tracks approaching the bridge, and the depots and terminals, and such tracks as were necessary to make connections between the Eastern and Western lines, and

to make this point the converging point of all the railway lines leading to the West? It was well known then that it was not possible to construct lines through the heart of large cities. How could the Union Pacific Company have guaranteed that the passengers and freight of all connecting lines should be transferred upon the grounds described in the Saunders deed, if the connecting lines only had the right to run their trains over the bridge? How could they have accomplished the object of making a "permanent and operating connection between the railroads desiring such connections, which do, or may, begin or end in, or pass through, Omaha and Council Bluffs, and the tracks and business of said roads" if the use was limited to the bridge?

As we said before, has the complainant not as much right to run its trains between Twentieth Street in Omaha to South Omaha, to a connection with the lines converging there, as it has to run its trains from the Union Passenger Transfer depot in Council Bluffs—where the Eastern lines converge—to the bridge? Both are necessary to make the proper connections. Why is it that appellant is so strenuous in its claim that the complainant must not use the property between Twentieth Street and South Omaha? It is because it knows that the testimony

Appellant's aim.

in this case shows that to run to Twentieth Street would only place the road in a *cul-de-sac*. From this point complainant cannot construct a road to South Omaha where are located the largest industries in the State of Nebraska. On the south is the Burlington road; its elevation is such that no road leaving the Union Pacific can go under or over it. On the north at Twentieth Street are the Government's buildings, and tracks leading thereto at different grades, so that no road can pass over, or under, or across them at grade. The Union Pacific Company owns a large amount of property which it would be necessary to go through, the condemnation of which is exceedingly doubtful under the laws of Nebraska. Furthermore, it appears by the testimony of Mr. Stickney that a line cannot be constructed parallel to the Union Pacific line from the bridge to South Omaha. The line runs most of the way through a narrow ravine; it is lined with large buildings, part of the way by other railway tracks, and runs through the very heart of the City. No serious claim is made that such a line can be constructed. Now, then, if counsel's position is true—that the complainant can run its trains across the bridge, and as far as Twentieth Street, but cannot cover the intervening two miles between Twentieth Street and the place where

Impediments to the construction of a road to South Omaha.

these other lines connect with the Union Pacific road —the declared object of Congress, and of the people of Omaha and Douglas County, is frustrated.

We will hereafter show that the Union Pacific Company has created this property as a terminal and connecting link; that it has allowed the other companies to use the same in pursuance of a duty imposed upon it by the Act of Congress, as construed by the Supreme Court of the United States. Furthermore, the tripartite agreement requires the Union Pacific Company to allow the complainant to use it without "discrimination" or "preference." Would it not be a discrimination to allow one company to use tracks sufficient to make all connections between the Eastern and Western lines, and another company not?

Interpretation by the bridge mortgages.

Some light is thrown upon the intention of Congress, as well as of the First and Second Pacific Companies, by an examination of these mortgages. The first bridge mortgage, Complainant's Exhibit 1, was made immediately after the passage of this Act, and its declarations are exceedingly potent in the interpretation to be placed upon the Act of 1871. It will be noted that this mortgage recites that Congress had by this Act authorized the construction of a bridge and railroad lines across the Missouri River,

between Omaha, in the State of Nebraska, and Council Bluffs, in the State of Iowa; not merely a bridge, but a bridge and railroad lines. It further recites that "Whereas, the Company for the purpose of purchasing and acquiring the lands and materials necessary for the construction of said bridge, its approaches and connecting lines, and for constructing the same has determined to obtain a loan of money," etc. The mortgage, Bill of Complaint, page 74, conveys "all and singular the said bridge over the Missouri River, between Omaha and Council Bluffs, and the approaches thereof, and the appurtenances belonging thereto, including all parts and portions of the said bridge now constructed, or hereafter to be constructed, and the depots at Council Bluffs and Omaha as aforesaid, and the lines and tracks required to perfect the said bridge, its approaches and appurtenances, and to connect the same with the neighboring lines, including in this conveyance as well the lines and tracks now constructed, as those which may be hereafter constructed," etc. Again, we specifically call the Court's attention to Article 1, of this mortgage, page 69, Bill of Complaint. It authorizes the trustees to levy bridge tolls "upon all property and passengers to be transported over, or which shall use or have the benefit of the said bridge, or the de-

Recital in first mortgage of reason for making loan.

pots connected therewith, at Council Bluffs or Omaha, or the lines of track required to connect the said bridge with the railways having their terminus at Omaha and Council Bluffs." Here in this mortgage are the declarations of the parties that the object of constructing this bridge, the tracks and depots, is for the purpose of connecting lines of railways that are or may be constructed to points at or near Council Bluffs and Omaha; and the trustees are authorized to levy tolls upon property and passengers transported over the bridge and depots "**or the lines of track required to connect the said bridge with the railways having their terminus in Omaha and Council Bluffs.*" No clearer declaration could be made than that this mortgage was made for the purpose of obtaining connections between the eastern and the western lines—between lines constructed to a point at or near Council Bluffs, and lines constructed to a point at or near Omaha. It was this property, not necessarily the property covered by the mortgage, but the property necessary to connect these various lines, which the Union Pacific Railroad Company, and its successors, contracted that other Companies might forever use. The question is, do these lines at South Omaha terminate at or near Omaha? Of this there can be no question. It makes no difference

The clear declaration of the mortgage.

*Italics are ours.

whether the tolls have been collected for the trans
portation of property from Council Bluffs to Sout
Omaha or Gilmore, or any other point, or whether th
tolls were limited to the bridge. It received th
right to levy separate tolls over all tracks necessar
to connect the eastern and western lines. This mort
gage was an acceptance in the broadest terms of a
of the benefits to be derived from the Bridge Act o
1871, and it imposed upon the property a perpetua
easement for the benefit of all Companies construct
ing their lines to a point at or near Omaha or Counc
Bluffs.

Growth of Omaha and South Omaha.

It appears in this case, and it is a fact of whic
the court will take judicial notice, that at the tim
the bridge, the depots and tracks connected there
with, as far as Twentieth Street, were constructed
the City of Omaha was a small place; that since sai
time it has grown into a city of 125,000 people; tha
immediately adjoining it on the south is South Oma
ha, which although a separate city so far as its cor
porate entity is concerned, is practically the sam
city, its business interests being identical with thos
of Omaha. It is a large business center. It has fiv
lines of railroad terminating within its limits, and
within a short distance of the limits of Omaha. Cer

tainly, these roads come within the definition of Congress of roads "at or near Omaha, Nebraska."

It appears that about the year 1883 or 1884 the stock yards were located at South Omaha, and the first packing houses constructed. From that day to the present time the stock yards and the packing house industries have increased, until today more than 172,000 cars per annum are transferred over the Union Stock Yards tracks to and from these industries.

It has become a great railroad terminal, and the Union Pacific line from Council Bluffs to South Omaha is a link between all of the eastern and western lines, which the Union Pacific Company has allowed all other railroad companies to use, and only denies this right to the complainant.

It appears, furthermore, that from time to time as the business required, the Union Pacific Company added additional tracks and side tracks and yard tracks, for switching and handling cars; that in its time table it is designated as the "Bridge District;" it is treated as a part of the Bridge Division; and it appears by the testimony that from Council Bluffs to Gilmore is one continuous yard, used by all these lines as a connection between the eastern and western lines.

Our request no more than was decreed by court in *Rock Island* case.

We ask no more in this case than the court in the Rock Island case said the Pacific Company was obliged by the Act of Congress to give to the Rock Island Company. We ask the same rights granted to the Rock Island, Milwaukee, Northwestern, and to all other companies using these terminals. It is perfectly evident that this is no new construction to the Union Pacific Company. It sought and obtained aid from Congress, and from the City of Omaha and County of Douglas, upon this express condition. To deny the Mason City Company the rights to use the bridge, depots and tracks connected therewith, is to allow the Union Pacific Company to violate its public contracts with the people of Omaha and County of Douglas, and to violate its solemn contract with the Government.

These contracts should be liberally construed to carry out the public benefits, and the objects sought to be obtained. If there is any reasonable doubt in the minds of the court as to the proper construction to be placed upon these Acts, and the tripartite agreement, the doubt should be resolved in favor of the public.

Appellant claims that before we demand the right to take the Union Pacific Company's property we should show clear statutory authority. We ar

not demanding the right to take the Union Pacific Company's property. We are simply demanding the right to the use of that property for reasonable compensation, on the same terms granted to other companies, which this Court said in the Rock Island case was the mere regulation of its use for reasonable compensation, in pursuance of a wise public policy.

Before the present company acquired this road, bridge and terminals, the right of other roads to use this property was decreed by the District Court of Douglas County in *Stuht v. Union Pacific Co.*,* and by the Supreme Court of the United States in the *Rock Island* case. Not only that, but the Attorney General of the United States in an opinion delivered in 1873, held as follows:

> "From the foregoing it appears that under the Act of February 24, 1871, and the provisions of the Act of July 25, 1866, thereby adopted, the privilege of crossing the bridge with their trains is secured to other railroad companies besides the Union Pacific Company, for reasonable compensation to be made to the latter." 14 *Opinions of Attorneys General* 235.

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*(See opinion p. 244 and 249, Vol. 1, Record.)

Lathrop v. Junction Ry. Co.

In the case of *Lathrop v. Junction Ry. Co.*, et al., 4 Fed., 41, the Pennsylvania Railroad Company, the Philadelphia & Reading Railroad Company, and the Philadelphia, Wilmington & Baltimore Railroad Company, were operating three lines of railway terminating in the City of Philadelphia east of the Schuylkill River. In 1860 a charter was obtained from the Legislature to build a road known as the Junction Railway, for the purpose of connecting these three lines of road. All but a few shares were taken by the three companies. In constructing the road a portion of the middle section was built on land belonging to the Pennsylvania Railroad, and the officers of the Junction Railway were the same as the officers of the Pennsylvania. The Pennsylvania Company claimed to own this section of the road, and the Supreme Court of Pennsylvania held that this part of the property belonged to that Company. The Philadelphia & Reading Company became, in connection with the Baltimore & Ohio Company, a competing line to the Pennsylvania Company, and that company refused to allow the freight of the Reading and Baltimore & Ohio Companies to be carried over this strip of track in the center of the Junction Railway's lines. The Court held that the Pennsylvania and the Reading Companies, having constructed this

line of road for the purpose of making a connection between the two lines, that the Junction Railway Company was entitled to use that part built by the Pennsylvania Company in order to carry out the objects of its construction—to form a continuous line between the three lines of railway. This shows that in construing the laws in reference to lines of public transportation the Court will give a liberal construction to carry out the intention of the Acts and to further the public interests.

So in the case of *Joy v. St. Louis*, 138 U. S., 1, which we shall hereafter refer to at some length in this brief, the Supreme Court of the United States enforced a clause in a contract which provided as follows: Joy v. St. Louis.

> "Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park, and up to the terminals of its road in the City of St. Louis, on such terms, and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies."

This "right of way" of the "second party" was held in the hands of the successor of this company,

not only to include the right of way then owned by the second party which was detached portions between the park and the depot, but all of the right of way thereafter purchased to complete its line between the park and the Union depot in the City of St. Louis; and also that the words "right of way" included the tracks and sidings, as the tracks were a necessary incident to the enjoyment of the "right of way."—See Opinion, pp. 40, 41, 44 and 45.

The court held that these laws must be given a liberal construction in the interest of the public. The court said:

> "Railroads are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation."

We again call the court's attention to the language of Chief Justice Fuller, where he held the Act of 1871 was to be liberally construed. He said:

"It is true that it appears that from the depot to the point in South Omaha where the tracks of the companies connected, is about four miles; but the scheme of Congress was to accomplish a more perfect connection 'at or near Council Bluffs, Iowa, and Omaha, Nebraska,' and we think the distance reasonably within the terms of the Act of 1871, **liberally construed, as the Act should be.*"

We have shown that this contention was made by the counsel; that it was insisted that if the Act of 1866 applied, that it only applied to the bridge; but the court took a broad view of the objects of these Acts, and carried out the intention of Congress to form a connection between the eastern and western lines.

Practical construction placed upon these acts by Union Pacific Companies.

But all possible doubt as to the proper construction to be placed upon the Act of Congress and the tripartite agreement contained in the Saunders deed, is removed when we consider what the First Pacific Company and this defendant have done under it.

"Tell me," says Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what that deed means."

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*The italics are ours.

Attorney-General v. Drummond, 1 Dru. & Wal. 353-366, affirmed on appeal in *Drummond v. Attorney-General*, 2 H. L., Cas. 837.

In *Chicago v. Sheldon*, 9 Wall. 50-54, the court said:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence."

C. G. W. Ry. v. Northern Pacific Ry., 101 Fed. 795.

Central Trust Co. v. Wabash & St. L. & P. Ry. Co., 34 Fed. 254.

Topliff v. Topliff, 122 U. S. 121, 127, 7 Sup. Ct. 1057, 30 L. Ed. 1110.

Steinbach v. Stewart, 11 Wall. 567, 576, 20 L. Ed. 56.

Hamm v. City of San Francisco, (C. C.) 17 Fed. 119, 124.

Mathews v. Danahy, 26 Mo. App. 660.

Jennings v. Machine Co., 138 Mass. 594.

District of Columbia v. Gallagher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526.

Knox Co. v. Ninth Nat'l. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93.

Leavitt v. Investment Co., 54 Fed. 439, 4 C. C. A. 425, 12 U. S. App. 193.

Metropolitan Nat'l Bank v. Benedict Co., 36 U. S. App. 604, 20 C. C. A. 377, 74 Fed. 182.

The situation at the time contracts were made with various companies.

We have seen that in 1890 the Second Pacific Company made a contract with the Rock Island and with the Milwaukee Companies for the use of the property from Council Bluffs to a point one and one-half miles south of the station in South Omaha. At that time the situation was substantially the same as it is to-day. The Rock Island's lines terminated at South Omaha and at Council Bluffs. The Milwaukee's line terminated at Council Bluffs. The other lines of railway, with the exception of the Mason City & Fort Dodge, terminated at Council Bluffs. The Elkhorn, the Missouri Pacific, the Burlington, and the Union Stock Yards railway, terminated at South Omaha. The packing house and stock yards industries had grown up. To be sure, the Union Pacific Company, when the management changed, arbitrarily refused to carry out these contracts, and they were enforced by an action in the Federal Court.

After this decision the Rock Island and the Milwaukee Companies continued to use the property, and are still using it, the Rock Island under the same contract, and the Milwaukee under a new contract, which we will hereafter consider.

In 1897, the first mortgage of the Union Pacific Railroad Company, and the Government lien, was foreclosed for the purpose of a reorganization, but the present Company recognized these contracts; it made no claim, so far as it appears, that the foreclosure cut out the rights of the companies. We are bound to presume that, following the language of the Supreme Court decision, the present Company recognized its duty to allow any company to run its trains over these tracks, and it made a new contract with the Milwaukee Company in May, 1898, for the use of the identical property and substantially upon the same conditions. At substantially the same time it made a like contract with the Northwestern Company. So far as appears, the Northwestern Company never had a contract for the use of this property up to that time. On the 25th day of April, 1900, the defendant made a contract with the Missouri Pacific Company for the use of a part of this property. On the 26th day of January, 1900, the defendant made a contract with the Illinois Cen-

tral for the use of the property from about Twentieth Street to the station. On the 16th of September, 1898, it made a contract with the Omaha & St. Louis Railroad Company (now the Wabash) for the use of the property from the eastern terminus of the Union Pacific Company to the Union Station. It also appears that a contract exists by which the Burlington uses the line from Gilmore to South Omaha, and from the eastern terminus to the Burlington Depot in Omaha. No railroad has been excluded from the use of this property, as required by the Act of Congress and the Saunders deed, except the complainant. But that is not all; in the month of September, 1898, this defendant entered into a contract, (Bill of Complaint, page 173, Exhibit No. 6,) with the Northwestern, the Rock Island and Milwaukee companies, whereby it carved out a part of this property as a Union Depot, and agreed that these companies, and various other companies, should have the right to the use of the depot and its facilities on certain specific terms therein stated. Article 14 provided that the Missouri Pacific, the Elkhorn, the Omaha, the Illinois Central, the Wabash and the Omaha & St. Louis, "shall have the right to the equal use of said terminal facilities upon signing the contract," and also that "any other railroad companies by and with

Union Depot contracts.

the consent of the party of the second part (i. e. the defendant company), and upon like subscription to a copy of this agreement in possession of the parties hereto as aforesaid, shall be admitted into said depot." Mr. Burt testified that this contract had been signed by the Northwestern, the Milwaukee, the Illinois Central, the Missouri Pacific, the Rock Island and the Wabash Companies. Is it not reasonable to suppose that the defendant company made this contract in order that it might perform its duties to the City of Omaha, and the County of Douglas, under the tripartite contract of 1872? In view of the decision of this court and of the plain specific provisions of the tripartite agreement, no other construction can be placed upon this act. The acts of the defendant company under these various contracts are certainly consistent with its duty, and amount to a practical construction placed upon the Act of Congress and the tripartite agreement.

We have, therefore, in this case the clearly expressed intention of the Courts to require the Union Pacific Railroad Company to allow any railway company to run its trains over so much of the Union Pacific Company's bridge, approaches and tracks connected therewith, as is necessary to make a connection between the lines constructed to the Missouri

River, at or near Council Bluffs, Iowa, and Omaha, Nebraska. We have also the clearly expressed intention of the people of Omaha, and the County of Douglas, to accomplish the same object. They were desirous of having the bridge built at Omaha instead of at some other place; they foresaw a great market town for the western country; and a crossing of the Missouri River, to which all the railroads from the East and West should center. It was their object to make this link a transfer ground, and a connection between those lines of railroad. That object has been partially accomplished, and its fruition will have been complete when the Court again lays down the principles that as to all roads these promises and pledges to the public must be carried out. We have also the practical interpretation placed upon this law, and the tripartite agreement, by this defendant company; and, last, there is no reason urged, or can be urged, why the complainant should not have the same rights as the other companies.

It is perfectly evident to any intelligent observer that it is not practicable for any railroad crossing the Missouri River, and properly serving the business of Omaha and South Omaha, to construct a new bridge, new terminals, and a new line through the city. It would do inestimable damage to the city and

business community, as well as being practically beyond the means of any railway company.

It appears by the testimony of Messrs. A. B. Stickney and Samuel C. Stickney, that Mr. Burt, the President of the Union Pacific Railroad Company, requested the complainant to use this bridge and property upon the same terms and conditions as the other roads were using it, and offered to make the same contract. To be sure, he said it would have to be submitted and approved by the Executive Committee, but that in his opinion the Executive Committee would approve it, because it was for the interest of the Union Pacific Company to make it, that it was a good contract for them to make. No objection was made by Mr. Harriman, the Chairman of the Executive Committee of the Union Pacific Railroad Company, except that the Mason City & Fort Dodge Railroad Company should not construct a line west of the Missouri River, and that if it should start to construct such a line, its contract rights should cease; and he said he was willing to recommend to the Executive Committee such a contract as this, but he never did recommend it; he never did notify the complainant, or any officer of the complainant, that the Union Pacific Company was ready to enter into such a contract.

Under all these circumstances why should not the Mason City & Fort Dodge Railroad Company have the same right as the other companies? It is willing to pay the same compensation; it is in the interest of the complainant and the defendant and of the public, and there is no reason except the exercise of arbitrary power, so fascinating to so called "railroad magnates" of the present day. They are willing to break their contracts, show bad faith to the public, and injure themselves, in order to show their authority and their power. There is no ground in law for the denial of this right; there is no principle in equity to justify the defendant's conduct. We ask no right not granted to other companies, for which we are willing to pay the same compensation which the defendant has three times fixed as a reasonable compensation for the use of the property. No suggestion has been made that it is not adequate.

II

(a) The Saunders deed was not a conveyance upon condition subsequent as to the condition that any other railway company should have a right to run its trains over the bridge, approaches and tracks connected therewith. (p. 152.)

(b) But even as to conditions subsequent, the remedy is not confined to a forfeiture. (p. 159.)

(c) The city is not a necessary party to the suit of the Mason City & Fort Dodge Railroad Company to enforce the covenant in the tripartite agreement. (p. 170.)

(d) The remedy is not confined to a party to the original contract from whom the consideration moved, but the contract may be enforced by any railway company having a right to use the tracks under the terms of the agreement, to-wit, "All railroads now or hereafter running into or out of Omaha and Council Bluffs." (p. 181.)

(a) The Saunders deed was not a conveyance upon condition subsequent as to the condition that any other railway company should have a right to

run its trains over the bridge, approaches and tracks connected therewith.

It seems to us entirely immaterial whether the conveyance of the land in the Saunders deed was upon condition subsequent or not, for the reason that the tripartite agreement, made between the Union Pacific Railroad Company, its successors and assigns, the County of Douglas, and the City of Omaha, was not a contract upon condition subsequent, but contains covenants which we seek to enforce. This agreement, although inserted in full in the Saunders deed, is distinct and separate therefrom. The county was a party to this agreement, and it had no interest in the lands conveyed. By reference to the records introduced in evidence it will be seen that this agreement was authorized by the City Council after a vote of the electors of Omaha, and by the Board of County Commissioners after a like vote of the electors of said County. It recites:

Tripartite agreement not upon condition subsequent.

> "Whereas, the parties hereunto desire to arrange for the more perfect connection of any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska."

It then recites that in consideration of the premises, and the receipt by the railroad company of the

bonds of the County of Douglas to the amount of $250,000, and in further consideration of the receipt by the railway company of a deed from the City of Omaha to certain real estate in said city known as "depot grounds," the railroad company for "itself and its successors, covenants and agrees to and with the County of Douglas and the City of Omaha as follows, to-wit."

Now, this is not the language of a condition. This is a covenant by the Union Pacific Railroad Company, and its successors and assigns, and the deed that was made by the City to the Railroad Company of the "depot grounds" imposed upon the Railroad Company the same covenants as this contract.

The resolution of the County Board authorizing the execution of the contract will be found on page 272, Record. The City also authorized the execution of the contract, and also provided for certain conditions in addition to the covenants in the contract. The resolution—Record, page 261—is as follows:

Tripartite agreement not upon condition subsequent.

> "that said deed shall contain said contract, or so much of the same as shall embody the *terms, conditions and restrictions therein contained, and a further clause that said lands so conveyed shall revert to said city in case they shall*

not be occupied and improved in accordance with the terms as set forth in said deed, and that upon the execution of said deed he shall deliver the same to the Mayor, who shall deliver the same to the proper representative of the U. P. R. R. Co. upon receiving from said Company a contract properly executed to the City of Onaha and Douglas County in accordance with the copy presented by the Omaha Bridge Committee."

It is therefore seen that the contract is an entire, separate and distinct agreement from the deed, but however that may be, an examination of this deed will show that the conditions on which the property is to be forfeited are not for a failure to comply with the covenants of the contract, to-wit, to allow any other company to run its trains over the Union Pacific Company's bridge and tracks according to the terms of the tripartite agreement. The very resolution passed by the City Council shows that it was to contain these covenants, "and a further clause that said lands so conveyed shall revert to said city in case they shall not be occupied and improved in accordance with the terms set forth in said deed." The clause in the deed providing for the forfeiture is as follows—Bill of Complaint, page 29.

"and provided further, that in case said premises, or any part thereof, be abandoned or disused, or converted to any other than the uses and purposes hereinbefore limited then the same shall revert to and become the property of the said City of Omaha."

Now, the uses "hereinbefore limited" are stated just previous to the conditions, as follows:

"hereby limiting the use of all said premises to the legitimate purposes of depot and transfer grounds, and grounds for right of way and approaches to the said Missouri River bridge, subject to the conditions and restrictions contained in the contract above recited."

That is, the property is limited to the use of depot and transfer grounds, and right of way and approaches to the bridge, but is also subject to the conditions contained in the tripartite agreement. But it is not to be forfeited for the failure of the Union Pacific Company to conform to every agreement and covenant stated in the tripartite agreement.

Should the Union Pacific Railroad Company abandon any part of the property, or convert it to

any other use than that provided for in the deed, to-wit, depot and transfer grounds, and ground for right of way and approaches, the property so abandoned, or so converted to other uses, shall revert to the city; or, if the entire property is abandoned, or converted to other uses, it shall revert to the city. It could not have been the intention that if the Union Pacific Railroad Company failed or refused to allow any other railroad company to run its trains over the bridge, and use the depot and property as provided in the sixth subdivision, that thereupon the whole property should be forfeited to the city. A moment's consideration will show that this could not have been the intention of the parties. The Union Pacific Company constructed its depots upon this property as provided by the contract. It has made a contract with all the other railroad companies whereby for 999 years it agreed to allow them to run their trains over the bridge, and to use the depot, and property and tracks connected therewith, jointly with the Union Pacific Company. Now, then, because it fails to allow another company to do this, we do not think the city could come in and forfeit the entire property; this would be doing damage to innocent parties, and such radical action could not have been the intention of the parties to the con-

tract; but should the property be abandoned, or p
to other uses, then, of course, no innocent par
could be injured by its forfeiture to the city.

It is a rule of law, well established, that con
tions subsequent are not favored in the law, and a
construed strictly, for the reason that they tend
destroy the estate granted, and in many instanc
when rigorously exacted, work hardships to innoce
parties.

Elyton Land Co. v. South & North Alaba
Ry. Co., 100 Ala. 396, 14 Southern, 207.
Chapin v. Harris, 90 Mass. 594.
Post v. Weil, 115 N. Y. 361.
1 Tiffany on Real Property, Sec. 68.
Ayling v. Kramer, 133 Mass. 12.

It is also settled that a conveyance to a railro
company of land upon such a condition as was a
tached to this deed will not be construed to be a co
dition subsequent upon which the land could be fo
feited, unless such forfeiture is clearly provided f
in the deed itself.

Elyton Land Co. v. South & North Alaba
Ry. Co., 14 Southern, 207, and authoriti
therein cited.

But assuming that the city could bring a suit t
forfeit the land, it is no defense to an action by th

Mason City & Fort Dodge Railroad Company for the right to enforce this covenant in its favor. This has been established by the case of *Joy v. St. Louis,* and the other cases cited in this brief.

(b) **But even as to conditions subsequent, the remedy is not confined to a forfeiture.**

Remedy not confined to forfeiture.

But even if we should concede that the proviso contained in the Saunders deed is to be construed as a condition authorizing the city to forfeit the depot property for a failure to comply with all of the covenants contained in the tripartite agrement, forfeiture and re-entry for breach of condition is not the sole remedy. It is unquestionably true that there are in the books cases where deeds have been drawn upon conditions in such form as to contain no promise by the grantee, where the court has held that re-entry for condition broken is the grantor's sole remedy, such being the intention of the parties; but wherever premises are conveyed upon condition, and language is used that will also imply a promise, the grantor has two remedies—he may re-enter for condition broken, or he may apply to a court of equity to enforce the agreement by the grantee, which is implied by his acceptance of the conveyance. To compel the grantor in every case to apply the drastic

remedy of re-entry has been recognized as an i
venient and, in some instances, an unjust mo
adjusting the rights of the parties.

We have already had occasion to comment
the reluctance with which courts have construe
visos and stipulations in contracts and deeds so
give the grantor this strict legal right to enfo
forfeiture of the grantee's estate. Much the
sort of feeling has induced courts of equity to p
the grantor, even where he is perfectly justif
enforcing the forfeiture, to adopt the less bu
some, and often more equitable, course of enfo
by injunction, or otherwise, the carrying out
objects for which the condition was original
tended. The case at bar is an example of such
Not only would the enforcement of the forf
here be a great hardship upon other corpor
using the tracks and depots, but would not
adequate remedy for the people generally wh
receive the benefits of railway communicatio
competition. It would tend to destroy the
facilities rather than increase them, as was int
by the people in aiding the Union Pacific Con
This view of the law is well settled by the autho

Stuyvesant v. Mayor, etc., of New Yo
Paige, 414.

Livingston v. Stickels, 8 Paige, 398.
Palmer v. Plank Road, 11 N. Y. 389.
Spalding v. Hallingbrook, 35 N. Y. 207.
Aikin v. Albany, Vt. & Canada Ry., 26 Barb. 298.
Close v. Burlington, C. R. & N. Ry., 19 N. W. 886.
Warner v. Bennett, 31 Ct. 478.
Peck v. Conway, 119 Mass. 546.
Smith v. Jewett, 40 N. H. 530.
Birmingham v. Leasan, 77 Maine, 494.
Stevens v. Pillsbury, 57 Vt. 205.
Godfrey v. Black, 17 Pacific (Kansas), 849.
Smith's Leading Cases, Vol. 1, Ninth Ed., 164 to 173, inc.

An examination of all of the authorities cited by the appellant will show that they are either cases simply holding that an estate conveyed upon condition subsequent does not re-vest simply on breach of condition, but requires re-entry; or they are cases like the one of *Close v. Burlington Road*, 64 Iowa, 149, where there was no agreement of the grantee to perform an act; (and we think this is the only case of the kind cited by counsel.) It is easily distinguishable from the case at bar. There was simply

a naked condition—no language that would imp
agreement by the grantee to do any act. The
said:

> "It is not to be denied, probably, t
> deed may contain a covenant on the pa
> the grantee, and be of such character
> create a personal obligation even thoug
> signed by the grantee."

Palmer v. Plank Road.

The court cites the case of *Palmer v.* *Road*, 11 N. Y. 389, to the effect that there may condition without a covenant, and where the guage imports a covenant the remedy of forf is not exclusive. Let us for a moment conside case:

In that case there was nothing but a cond there was no language which would import an ment by the lessee. The court, however, cited approval the case of *Livingston v. Stickels*, 11 and *Stuyvesant v. Mayor, etc., of New York*, by us in this brief, which laid down the rul where there is language importing an agreem well as a condition the party may have his re in equity to enforce it.

Stuyvesant v. Mayor, etc., of New York.

In *Stuyvesant v. Mayor, etc., of New Yor* *pra*, the opinion is by Chancellor Walworth.

was a conveyance to the city of property for a park upon conditions—one of them being that such lands should at all times, and forever thereafter, be appropriated, to be used for purposes of a public park, to be called Stuyvesant Square; another, that the corporation should "immediately proceed to regulate the grounds between Fifteenth and Seventeenth Streets, and extending 220 feet on each side of Second Avenue, and should enclose the lands on each side of the avenue," etc., and should plant and improve such enclosure. There was then a clause that if the city failed to perform any of these conditions the lands should revert. The court held that the agreements were sufficient to create a covenant as well as a condition, and that the grantor had an election of remedies. The court said:

> "Although the permitting of such a use of the premises involves a forfeiture of the grant in case the complainant thinks proper to enforce the forfeiture for this breach of the condition upon which the lands were granted, he is not bound to claim the forfeiture; but he may resort to his suit to compel a specific performance of this covenant."

Livingston v. Stickels.

We particularly call the court's attention to the case of *Livingston v. Stickels*, 8 Paige, 398—Opinion

also by Chancellor Walworth. In that case the Chancellor said:

> "The objection that the lease contains no covenant on the part of the lessee or his assigns to pay the tenth sale, so as to render them personally liable upon an alienation of the premises, with the consent of the lessor, does not appear to be well taken. If it were a mere condition, then it is evident the only remedy of the lessor would be by a proceeding against the purchaser, to recover the premises for a breach of the condition. But a clause of this kind may be so framed as to operate both as a condition and as a covenant; so as to give the lessor an election, either to proceed by an action of covenant, to recover damages for a breach thereof, or by an ejectment to enforce the forfeiture. No particular form of words is necessary to create a covenant. But any words will be effectual for that purpose which show that the party sought to be charged as a covenantor intended to agree to do, or to refrain from doing, something in which the other party had an interest. In *Harrington v. Wise*, Cro. Eliz. 486, where the agreement was, 'it is covenanted and agreed between the parties

that J. H. doth let the said lands for five years, provided, always, that the said W. shall pay to him annually during the term 120 pounds,' the court decided that this was a covenant for the payment of rent, as well as a condition. (See also *Doe v. Watt*, 8 Barn. & Cress. Rep. 316; Coventry's Read. ed. of Coke, 203.) Here, in addition to the clause of the lease which the appellant counsel cor[illegible]nds is a condition merely, the parties had inserted a previous covenant, on the part of the lessee and his assigns, well and faithfully to pay, fulfill, accomplish and perform not only the yearly rents thereinbefore mentioned and reserved, but also 'all and every, the several and respective payments, covenants, clauses, and conditions following,' &c., among which payments and conditions was this payment of the tenth sale upon every alienation. This is an express covenant, therefore, even if the subsequent clause, taken by itself, would have operated as a condition merely."

Peck v. Conway.

The Massachusetts Court, in *Peck v. Conway*, 119 Mass., p. 546, gave equitable relief in such a case. There the parties to the bill both derived title from one Ensign, who, in deeding the property held

by the defendants, had done so "with this expr
reservation, that no building is to be erected by
said Joseph B. (grantee), his heirs or assigns, u
the land herein conveyed." The Court held that
questionably Ensign, so long as he lived and
mained owner of the adjoining land, would be
titled to relief in equity to enforce the restricti
and the only question considered was whether
plaintiff, his grantee, was entitled to the same r
edy; the Court held that he was. The relief aske
the action was by way of injunction to restrain
defendants from building on the lot.

Smith v. Jewett.

In *Smith v. Jewett*, 40 N. H. 530, the Court
ting in equity expressly refused to decree a for
ture of an estate for breach of condition subsequ

Birmingham v. Leasan.

So also in *Birmingham v. Leasan*, 77 Maine,
it was held that equity would not lend its aid
divest an estate for breach of condition subsequ
and thereby enforce the forfeiture.

Both in the Maine and in the New Hampsh
case it is clearly intimated that the Court would
everything in its power to carry out the intentio
the parties with respect to the condition short of
forcing the forfeiture of the grantee's estate.

Stevens v. Pillsbury.

The case of *Stevens v. Pillsbury*, 57 Vt. 205,
clear authority for the position we have ta

There a bill in chancery was filed, praying a forfeiture of certain premises to the orator on account of the breach of a condition, and also "for such other and further relief in the premises as the nature and the circumstances of the case may require." It appeared that the orator had purchased from one Bliss certain hotel property. As an inducement to the purchase, the grantor agreed to close, and keep forever closed, his own hotel property, thereby insuring the purchaser against competition so far as the grantor was concerned. In order to render this agreement enforceable, Bliss, on the same day of the conveyance of the hotel property to the orator made a further conveyance of his remaining hotel property upon the following condition:

> "Yet the condition of this deed is such that if I, the said Ellis Bliss, my heirs, executors, administrators, and assigns do and shall hereafter keep and hold the above premises free and clear from all the purposes of a hotel, tavern, inn, or boarding-house; also, from all the purposes of livery or livery stabling, as well the buildings that are now erected thereon, as any and all which shall be erected thereon, so long as wood grows and water runs, truly and faithfully as to the said Harry

> B. Stevens, his heirs, executors, administra
> tors, and assigns, then and in that case, thi
> deed is to be null and void, otherwise in ful
> force and effect."

Bliss subsequently made transfers of the re
mainder of his property, and several of the subse
quent grantees broke the condition. The Court hel
that while there had been a breach of the conditio
so as to warrant a technical forfeiture of the prem
ises, equity would grant relief by way of compensa
tion rather than by way of forfeiture. The Cour
said:

> "Under these circumstances, inasmuch a
> the orator has come into a Court of Equity
> thereby offering to do equity, we think i
> would be inequitable not to relieve the owner
> of those portions of the Bliss hotel property
> who are innocent of any breach of the cond
> tion of the deed, from an entire loss of th
> improvements and enhanced value of the prop
> erty."

And the Court decided that equity would be don
to the orator as against the defendants by requirin
the payment to the former by the latter of a su
equivalent to what he had paid for the immunit
from competition, together with interest.

In *Godfrey v. Black*, 17 Pac. (Kan.) 849, it was flatly held that a lessor having a right to re-enter for condition broken, was not confined to this remedy. He might insist upon the observance of the covenants of the lease. The facts were that the petitioner was the owner of certain premises upon which he had erected a hotel. The hotel was leased to certain parties, with the usual covenant against subletting, and also on the condition that it was to be used only for hotel purposes. The petition set up that the lessees had sublet a portion of the hotel to one Godfrey, who intended to occupy the premises for the transaction of real estate business. The petition prayed an injunction against both the lessees and Godfrey, to prevent the subletting. A temporary injunction was granted, and to reverse that order appeal was taken to the Supreme Court. The Court said: Godfrey Black.

> "It is claimed that injunction is not the proper remedy in such case; and actions to recover possession and to recover damages for trespass, where the defendants could have the issues submitted to a jury, are suggested. The lessor is not confined to these remedies, nor are they adequate. He has a right to insist that the covenants of the lease shall be

observed, and that the premises shall be used only for the purposes agreed upon. It does not appear that the lease was to terminate upon a breach of the covenants; but, even if the lessor had a right to re-enter, that would not preclude him from obtaining equitable relief to prevent a forbidden use of the premises."

The Minnesota Court held in *Stees v. Kranz*, 32 Minn. 313, that under a lease containing a covenant that the lessee will not put the rented premises to a certain use, and providing for re-entry for breach of the covenant, the landlord is not restricted to his right of re-entry, but may proceed by injunction to restrain the breach of the covenant.

(c) **The city is not a necessary party to the suit of the Mason City and Fort Dodge Railroad Company to enforce the covenant in the tripartite contract.**

The defendant at the final hearing for the first time raised the question that there was a defect of parties to this action; that the City of Omaha was a necessary party to the enforcement of any rights under the Saunders deed and tripartite agreement. We submit that this objection is without merit. A moment's consideration of the covenants will show

that no relief is demanded, or can be demanded, against the City, and that the City is not in any way, as a corporation, interested in the subject-matter of the action or the decree.

It was held in the case of *Stuht v. City of Omaha*, Record, Vol. 1, page 242, that the legal title of this land was never in the City; that the inhabitants thereof bought it by bonds voted in 1869, and had it conveyed direct by the grantor to a trustee in trust, and by him conveyed to the railroad company; that the covenants were for the benefit of all of the inhabitants of Omaha and County of Douglas, that any reversion would enure to the inhabitants generally, and that the City had no authority to release this covenant to the railroad company. We take it that this position is self-evident upon an inspection of the document. The railroad company, in consideration of receiving $250,000 of bonds from the County, and certain real estate purchased with the proceeds of $200,000 bonds of the City, covenanted that any railroad company might have the right to run its trains over this property. This was a mere right of user. The railroad company does not part with the title of any property or the possession thereof.

U. P. R. R. Co. v. C. R. I. & P. Ry. Co., 163 U. S. 582.

What decree could in this case be rendered against the City? What right of the City is directly affected by a decree in this case? A general public interest is not sufficient—it must have some direct property interest which would be necessarily taken away, or adjudicated upon to its prejudice by a decree in our favor, or against us, in this case. No such right is involved here. "Parties," said Mr. Justice Curtis in *Shields v. Barrow*, 17 Howard, page 130, "are divided into three classes:"

Shields v. Barrow.

"1. Formal parties.

"2. Persons having an interest in the controversy, and who ought to be made parties, in order that the Court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the Court, so that the Court can proceed to a decree, and do complete and final justice, without affecting other persons not before the Court, the latter are not indispensable parties.

"3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

This definition has been accepted to the present day by all jurists and law writers as an accurate definition, applying to Courts of equity. The question in this case is not, therefore, whether we might properly have made the City a party, but whether a decree can be given in this case without prejudicing the rights of the City; in other words, is the City an indispensable party? If the City is an indispensable party, then the United States is an indispensable party, because Congress provided in the Act of 1871 that all railroad companies should have the right to use the bridge and its approaches and depots connected therewith, and the United States has the same interest in seeing the agreement performed as the City has. If the City is a necessary party, then the County is a necessary party, because it also donated bonds as a consideration for this covenant which we seek to enforce; but the fact is that the grant was for

the benefit of all of the people, it was a covenant for the benefit of any railroad company which should thereafter construct its lines to the Missouri River, and in the enforcement of that right no one but the Union Pacific Railroad Company, whose property is to be used, need be made a party—especially is this the case where no issue as to defect of parties was raised by the demurrer or answer. In such a case no question as to defect of parties can be raised except as to indispensable parties.

Mechanics Bank v. Seton, 1 Peters, 585.
Segee v. Thomas, 3 Blatchford, 11.
Keller v. Ashford, 133 U. S. 610.
1 Tiffany, Real Property, Sec. 68.

Mechanics Bank v. Seton.

In *Mechanics Bank v. Seton*, 1 Peters, page 299, one Adam Lynn had $3,000.00, par value, of the capital stock of the Mechanics Bank in his name, which was avowedly held by him for Louisa and Ann Maria Seton. The Bank refused to transfer the stock, claiming that Adam Lynn was indebted to it. No objection as to defect of parties was raised by demurrer or by answer, and the Supreme Court of the United States held that Lynn was not an indispensable party, and therefore the objection could not be raised on final hearing. The Court said:

"The second objection, that Adam Lynn ought to have been made a defendant, would seem to grow out of a misapprehension of the object of this bill, and the specific relief sought by it.

It ought to be observed here, preliminarily as a matter of practice, that although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing on appeal, except in very strong cases, and when the Court perceives that a necessary and indispensable party is wanting.

The objection should be taken at an earlier stage in the proceedings, by which great delay and expense would be avoided.

The general rule, as to parties, undoubtedly is that, when a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits and that there may be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or

less, a matter of discretion in the Court; and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. The relief granted will always be so modified as not to affect the interest of others; 2 Mad. Ch. 180; 1 Johns. Ch. 350.

Where was the necessity or even propriety of making Lynn a party? No relief is sought against him. The bill expressly alleges that he was perfectly willing to make the transfer; but permission was refused by the bank. There is no allegation in the bill upon which a decree could be made against Lynn; and it is a well-settled rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. 2 Mad. Ch. 184; 3 P. Wil. 310, N. 1."

This case was cited and approved in *Keller v. Ashford*, supra, in which a bill was filed by a mortgagee against the grantee of the mortgagor assuming the mortgage to enforce the covenant. The court held, by Mr. Justice Gray, that the mortgagor was not a necessary party, citing *Bank v. Seton*, 1 Peters, 299.

There have been many cases before the courts for the enforcement of such covenants, and in no case

xcept the Joy case has the City, or the party procur-
ng the covenant by the railroad company, been made
party.

South & N. A. R. Co. v. Highland Ave. & B. R. Co., 23 Southern, 973.

Union Depot Co. v. Southern Ry. Co., 16 S. W. 920.

Chicago, St. P. & K. C. Ry. v. Kansas City, St. J. & C. B. Ry., 52 Fed. 178.

Same case, 38 Fed. 58.

Canada Southern Ry. Co. v. International Bridge Co., 8 Fed. 190.

Canada So. Ry. v. International Bridge Co.

In the case of the *Canada Southern Railway Co. International Bridge Co.*, 8 Federal, Judge Wal-
ce enforced a covenant against the International
ridge Company somewhat similar to the case at bar.

In the Chicago, St. Paul & Kansas City case,
Fed. 178, the City granted the right to the Bur-
gton Road to lay its tracks in certain streets, upon
e condition that any other railroad company should
ve the right to run their cars, locomotives and
ins over and upon the same. The City was not
de a party in this case.

South. & N. A. R. Co. v. Highland Ave. & B. R. Co.

In *South & N. A. R. Co. v. Highland Ave. & B. R.*
, 23 Southern, 973, a provision in a deed by a land
npany of a right of way provided "that any other

railroad company running into or through the city of Birmingham shall have the right to run a parallel track upon and along the same right of way." A suit was brought against the Railroad Company, but the City was not made a party. In considering a motion to dismiss the appeal for want of equity the Court stated that "the attention must be directed wholly and exclusively to the equities of the bill, not to its frame, or the want or misjoinder of parties, or other matters which, if a demurrer were interposed, would be regarded as waived, if not specially assigned." The attention of the Court was thus called to the question of parties, and if the city was an indispensable party to the enforcement of this right, it could not be waived by failure to demur or raise the question by answer. The case is therefore a strong authority for the position that the City was not an indispensable or even a necessary party. In discussing the nature of the right to be enforced, the Court said:

> "In the case of *Elyton Land Co. v. South & N. A. R. Co.*, 100 Ala. 396, 14 South. 207, we had occasion to construe this same deed, for the single purpose of determining whether the proviso contained therein was technically a condition, the breach of which, by the gran-

tee's refusal to allow another railroad to build a parallel track on the right of way, would cause a forfeiture, and authorize the grantor to recover possession. We there decided that it was not a condition, but a covenant or limitation. Whether it be construed as a covenant or as a limitation is immaterial. Its effect upon the rights and obligations of the parties thereto is the same. It operated to create, in favor of such other railroads as might seek in the future to run into or into and through the City of Birmingham, an equitable easement in, or right to build a parallel track upon and along, the right of way granted to appellant; and by its acceptance of the deed, appellant became bound to comply with its stipulations. *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, and 45 Am. & Eng. R. Cas. 655; *Chicago, St. P. & K. C. Ry. Co. v. Kansas City, St. J. & C. B. R. Co.*, 52 Fed. 179; *Whitney v. Railroad Co.*, 11 Gray 359.

"That a Court of Equity has jurisdiction, at the instance of a beneficiary under such a covenant, to enforce the specific performance of the covenant, by declaring such beneficiary entitled to the use of the right of way, and

enjoining any interference with the exercise of the right to use it, even though such beneficiary be not specifically named in the agreement, and was not in existence at the time it was made, we regard as settled by the first two cases above cited."

It is unnecessary to cite other cases.

In the Joy case, there was a public park, through which no railroad company had a right to run without the consent of the city; it was proper, therefore, that the city should be a party to the proceeding, but the Court did not decide that the City was an indispensable party. The City simply intervened, and asked to have the covenant enforced. But in the Kansas City case Judge Brewer and Judge Phillips enforced the covenants without the city being a party. The case went to the Supreme Court of the United States on a motion to stay the decree, on the ground that a supersedeas bond had been given. The motion was refused, and it is fair to assume that, if the city had been an indispensable party, Judge Brewer would have so held. In no other case that we know of for the enforcement of such a right as this, has the City or County ever been made a party.

(d) **The remedy is not confined to a party to the original contract, from whom the consideration moved, but the contract may be enforced by any railway company having a right to use the tracks under the terms of the agreement, to-wit: "All railroads now or hereafter running into or out of Omaha and Council Bluffs."**

Remedy not confined to party to original contract.

3 Pomeroy's Equity Jurisprudence, Section 1295.

Joy v. St. Louis, 138 U. S. 1.

South & N. A. R. Co. v. Highland Ave. & B. R. Co., (Alabama), 23 Southern, 973.

Gilbert v. Peteler, 38 N. Y. 168.

Keller v. Ashford, 133 U. S. 610.

Southern Kansas Ry. Co. v. Oklahoma City, 69 Pacific, 1050.

Austin v. Seligman, 18 Fed. 520.

C. St. P. & K. C. Ry. Co. v. K. C., St. Joe & C. B. Ry. Co., 52 Fed. 178; 38 Fed. 58.

Gibson v. Porter, 15 S. W. 871.

Feizel v. First German Soc. M. E. Church, 9 Kansas, 402.

Baptist Church v. Presbyterian Church, 18 B. Monroe, 635.

Cady v. Conger, 19 N. Y. 256.

The ancient common law doctrine that no one but a party to the contract from whom the consideration moved could sue upon it has given place to a less technical, more reasonable and liberal rule in most jurisdictions; but, however that may be in actions at law upon such covenants, the doctrine never applied to equity, and more especially to the enforcement of covenants in the nature of easements created in real property, and *a fortiori* in the case of easements created for the benefit of the public. As to these covenants, it has always been settled that anyone who became entitled to enforce them could do so by an action in equity irrespective of whether he was a party to the contract or not. We have in our main brief we believe demonstrated beyond question that the covenant in the Act of Congress, accepted by the Union Pacific Company, and in the tripartite agreement in the Saunders deed, created an equitable easement in the property of the Union Pacific Railroad Company for the benefit of the public, to be availed of by any railroad company which should at any time bring itself within the description contained in these instruments.

Again calling the Court's attention to this phase of the case, it was thoroughly argued and disposed of in the Joy case. In that case we have been favored

with copies of briefs of counsel and the Record in the Supreme Court of the United States. It was there argued by Mr. Wells H. Blodgett with great force that in order for an equitable easement to be created, there must be two estates—a dominant and a servient estate, and that if property is conveyed in which a servient estate or easement, is created, the easement is only co-extensive with the property so conveyed. To illustrate: In that case the Park Commissioners granted to the railroad company a right of way through the park, in consideration of which the railway company agreed that any other railway company might run its trains over its railway—not only through the park, but up to the Union Station, through the City of St. Louis; that included property which the company at that time did not own, and it was urged that this was not an equitable easement; that an equitable easement could only be created in the use of the property granted by the Commissioners, and that it inured to the benefit only of other property retained by the grantor, but the Court held to the contrary, and held that by accepting the conveyance from the Park Commissioners, and agreeing that any other company might use its right of way—not only through the park, but up to the station—it created thereby an equitable ease-

ment in all its property which any railway company might avail itself of in an action in equity.

Now, in the case at bar the Union Pacific Company, by accepting the Act of Congress, agreed that any other railway company might run its trains over the bridge and its approaches and use the depot and tracks connected therewith. This created an equitable easement for the benefit of any company which should thereafter construct its line to any point at or near Council Bluffs or Omaha. By the acceptance of the $250,000 of bonds from the County, and the deed of the property purchased with the $200,000 of the City bonds, the Union Pacific Company made a like agreement and the easement was not confined to the property conveyed by the Saunders deed; it covered whatever property was necessary to connect the roads thereafter to be constructed to a point at or near Council Bluffs and Omaha. This, therefore, being an equitable easement, it has by the authorities we have cited been settled beyond question that any railway company thereafter coming within the description of the Act, or of the Saunders deed, may avail itself of that equitable easement, and may enforce it in an action against the Union Pacific Railroad Company, or any company taking the property with notice of the easement. This also was settled

in the Joy case. It was urged by Mr. Blodgett in his brief (page 72) that there was no privity of contract, or mutuality of equitable remedy. He said:

> "But as the Colorado Company was only to be admitted under such agreement as might thereafter be made between it and the owners of the railroad, and as no such agreement has been entered into, there now exists neither privity of contract nor mutuality of equitable remedy, and unless mutuality of remedy does exist between the parties no specific performance can be decreed."

But the Court held to the contrary. Although in that case the City was a party, the reason, and the only reason, why the City was a party, was that the new railroad company seeking to avail itself of this equitable easement would run through a public park, and by the act creating that park the City of St. Louis, as the successor to the Park Commission, was vested with the absolute control, the power to police and the duty of protecting it. This was held by Mr. Justice Blatchford in the opinion in that case, in which he said:

> "The City of St. Louis is in the present case not merely a nominal party, but is charged with the duty of protecting the park,

and of preserving and fostering the commerce of the City."

A reference to the Park Act will show this position; but the Court did hold that the covenants might be availed of by any railway company entitled to the privileges.

In the case at bar we do not occupy the position of a mere stranger or interloper in no way contemplated by the contract, for the reason that the Mason City & Fort Dodge Railroad Company is as much entitled to enforce this right as though it had been by name mentioned and the covenant made for its special benefit. The covenant in the Act of Congress is "any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska," and the covenant in the Saunders deed is substantially the same. It can make no difference whether we come within the general definition or a specific definition. The rule is clearly laid down by Mr. Pomeroy (Volume 3, Second Edition, Pomeroy's Equity Jurisprudence) as follows:

> "Before describing the general effects of contracts, I shall notice some particular agreements which create special rights in equity where no such rights, or perhaps no rights at all, between the same parties, exist at law.

When the owner of land enters into a covenant concerning it, when in a deed the grantor or grantee covenants, or in a lease the lessor or lessee covenants, concerning the land, concerning its use, restricting certain specified uses, stipulating for certain specified uses, subjecting it to easements or servitudes, and the like, and the land is afterwards conveyed, or sold, or passes to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it, at the suit of the original covenantee **or of any other person who has a sufficient equitable interest although perhaps without any legal interest, in such performance.* It makes no difference whatever, with respect to this equitable liability, and this right to enforce the covenant in equity, whether the covenant is or is not one which in law 'runs with the land.' "

C., St. P. & K. C. Ry. v. K. C., St. Joe & C. B. Ry.

In the case of the *Chicago, St. Paul & Kansas City Railway Company v. Kansas City, St. Joe & Council Bluffs Railway Company*, Mr. Justice Brewer and Judge Phillips, of the Western District of Mis-

*Italics are ours.

souri, enforced a similar covenant in favor of the Chicago, St. Paul & Kansas City Railway Company. To be sure, the discussion does not cover this point, but Mr. Justice Brewer stated in the opinion in that case that the whole subject had received careful consideration by him in the Joy case, and in that case the subject was carefully argued and considered—not only by Justice Brewer, but by the Supreme Court of the United States.

So. & N. A. R. Co. v. Highland Ave. B. R. Co.

A like rule was laid down in the case of *South & N. A. R. Co. v. Highland Avenue B. R. Co.*, the language of which is quoted at another place in this brief, but which is so pertinent that at the risk of tautology we quote it again in this connection:

> "In the case of *Elyton Land Co. v. South & N. A. R. Co.*, 100 Ala. 396, 14 South. 207, we had occasion to construe this same deed, for the single purpose of determining whether the proviso contained therein was technically a condition, the breach of which, by the grantee's refusal to allow another railroad to build a parallel track on the right of way, would cause a forfeiture, and authorize the grantor to recover possession. We there decided that it was not a condition, but a covenant or limitation. Whether it be construed as a cove-

nant or as a limitation is immaterial. Its effect upon the rights and obligations of the parties thereto is the same. **It operated to create, in favor of such other railroads as might seek in the future to run into, or into and through, the City of Birmingham, an equitable easement in, or right to build a parallel track upon and along, the right of way granted to appellant;* and by its acceptance of the deed appellant became bound to comply with its stipulations. *Joy v. St. Louis*, 138 U. S. 1; 11 Sup. Ct. 243, and 45 Am. & Eng. R. Cas. 655; *Chicago, St. P. & K. C. Ry. Co. v. Kansas City, St. Joe & C. B. R. Co.*, 52 Fed. 179; *Whitney v. Railway Co.*, 11 Gray, 359.

*"*That a Court of Equity has jurisdiction at the instance of a beneficiary, under such a covenant, to enforce the specific performance of the covenant, by declaring such beneficiary entitled to the use of the right of way, and enjoining any interference with the exercise of the right to use it, even though such beneficiary be not specifically named in the agreement, and was not in existence at the time it was made, we regard as settled by the first two cases above cited.*"

We refrain from further consideration of the authorities. It is perfectly apparent that the rule is

*Italics are ours.

established, and should not be departed from in thi
case. If the appellant's position is true—that no on
but the City can enforce this right—then we say th
County is equally interested, and no one but th
United States could enforce the easement created b
the Act of Congress. It would be cumbersome, in
deed, if a railway company, constructing a line t
Omaha, must await the slow processes by municipa
authorities, much less the Government, in order t
avail itself of this easement. The public would de
rive little benefit if the Government, the City and th
County must act before this right could be mad
effective. But what can the City do? It exhauste
its power as soon as the contract with the Unio
Pacific Railroad Company was finally consummated
it cannot change that contract; it cannot grant th
Mason City & Fort Dodge Railroad Company an
rights in this property which have not already bee
granted; it is powerless to convey any interest in th
depot property, or the bridge, or the railway. Th
same may be said of the County. A legal rule whic
would prevent the Mason City & Fort Dodge Rai
road Company from availing itself of this right ex
cept through the cumbersome proceedings of munici
palities and the Government is a rule technical an
devoid of equity.

III.

The covenants and conditions in the Union Pacific Bridge Act of 1871, and the Act of 1866, and the tripartite agreement contained in the Saunders deed, are binding upon this defendant.

The language of the Acts of Congress is clear, distinct and decisive in subjecting the present Company to the duties, obligations, conditions and burdens which they imposed on the original Company.

Section 15 of the Act of 1862 provides that "wherever the word Company is used in this act it shall be construed to embrace the words their associates, successors and assigns, the same as if the words had been properly added thereto." If effect were given to this clause and the words successors and assigns read into the act after the word Company wherever it occurs, the impression would be irresistible that it was the purpose of Congress to extend the grant of all the rights, privileges, franchises, and property conferred upon the original Company to any other Company succeeding it, and to impose upon the latter all of the duties, obligations and bur-

dens resting on the former. There was good reason for treating a succeeding Company the same as the original Company, for Congress had in view in this elaborate Act, not the Company named in it but the great public advantages which would result from the construction and operation of this continental road. It is a very narrow view of the case to confine its provisions to the Company as if its interests were the end sought to be accomplished instead of the advancement in a critical exigency of the country of vital and transcendent service.

A single illustration will bring this vividly into view. Section 9 provides that the Leavenworth, Pawnee & Western Railroad Company of Kansas was authorized to construct a railroad and telegraph line from the Missouri River at the mouth of the Kansas River on the south side thereof, so as to connect with the Pacific Railroad of Missouri to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, upon the same terms and conditions in all respects as are provided in this Act for the construction of the railroad and telegraph from the said meridian west; that is to say, the Leavenworth Company was to have large subsidies of lands and bonds and was to build a road of a certain character within a certain time and operate

as required by the Act. If this were all, a grantee f that Company would not, as against the United tates, be entitled to the subsidies of lands and onds, even if it built and operated the road in strict ompliance with the requirements of the Act. The eavenworth Company could not transfer to another s rights, privileges and franchises unless it could how congressional authority for doing so. But if ne 9th section read that the Leavenworth Company, s associates, successors and assigns, are authorized o construct a railroad, etc., etc., and that Company ith proper authority from the State has transferred s rights, privileges, franchises and property to nother Company, that Company would be within ne words of the grant, and, upon performance of its onditions, stand in the shoes of its grantor and be ntitled to all that it took under the Act. That is recisely what we have under the general provision f the clause of section 15 above quoted.

And this is equally true in respect of the duties, bligations, burdens and conditions imposed by the ct upon the Leavenworth Company; by the terms f the act all those duties, obligations, burdens and onditions would devolve and be binding upon its rantee as fully and imperatively as upon itself. hat has been said of the Leavenworth Company

is equally true of all the other Companies which formed the Pacific system.

Now we are ready to take another step forward. Section 18 provides that "and the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due regard to the rights of said Companies, add to, alter, amend or repeal this act." In the exercise of the power of amendment thus reserved, Congress passed the Act of 1864. The Act of 1864, Sec. 22, contained a like clause. These two Acts are to be read together as one. In the case of the *Union Pacific Railroad Company v. Hall*, 91 U. S. 343, 350, Mr. Justice Strong said:

> "But the amendatory Act of 1864 is not to be overlooked. It is to be regarded in connection with the Act of 1862, and interpreted as a part of it."

In that case the Court held that the power to build a bridge over the Missouri River was granted in the Act of 1862, and that no express grant to do

was needed. But this grant was distinctly ex-
ssed and defined in the 9th Section of the Act of
4, which provided "that, to enable any one of said
porations to make convenient and necessary con-
ions with other roads, it is hereby authorized to
blish and maintain all necessary ferries upon and
ss the Missouri River and other rivers which its
may pass in its course; and authority is hereby
n said corporation to construct bridges over said
ouri River and all other rivers for the conven-
of said road."

n this connection two facts are to be noted.
s that the clause of Section 15 of the Act of
above quoted, applies to the Union Pacific Com-
and is to be read thus:—Authority is hereby
the Union Pacific Company, its associates, suc-
and assigns, to construct a bridge over the
ri River at Council Bluffs. And this for the
reason that the two Acts are to be read to-
as one.

cordingly the clause of the fifteenth section of
act already quoted requires us to insert after
l "corporation" in the 9th section of the Act
the words "its associates, successors and as-

The other fact to be noted in this connection is that the bridge here in question built by the Union Pacific is a part of its road, and must be operated as such, as was distinctly held in the case of *Union Pacific Co. v. Hall*, supra.

We pass now to the Act of 1871. This Act is an amendment of those of 1862 and 1864. True, it is not entitled "An Act to amend" those acts or either of them, nor in the body of it is it declared to be so, but such is its character. In determining whether an act is amendatory of another, the terms and objects of the two must be considered. If the earlier discloses on its face a definite purpose and policy and the later advances that purpose and amplifies that policy, they must be read together; the first being the principal and the second the amendatory act, no matter whether the latter is declared to be amendatory or not. The Court, in determining whether it is of that character, will look to its purpose and effect. If it is entitled an amendatory act, or in the body of it is stated to be such, there can be no difficulty; and if it appears on its face to be of that nature, although not expressly stated, the same is true. It is very easy to see that the Act of 1871 is within this principle.

Turning to Section 9 of the Act of 1864, in order o ascertain the powers granted to the Company, and he purpose for which they are granted, we find the erms in substance as follows: To enable any one of aid corporations to make convenient and necessary onnections with other roads, authority is hereby ven to it to construct a bridge over the Missouri iver, at Council Bluffs and Omaha. Here is (1) the ant of the power to build a bridge; and (2) the rea- n for doing so, that is, to make connection with ner roads. That connections of roads in Missouri d Iowa, with those authorized in the Acts of 1862 d 1864, were in the contemplation of Congress ap- rs from their definite and explicit terms. Sec- n 9 of the Act of 1862 authorizes the Leavenworth npany to build its road from the Missouri "so as connect with the Pacific Railroad of Missouri," ch ran from St. Louis to Kansas City, and in the e section that that Company's road through sas is required to be so located that the several oads through Missouri and Iowa may connect the Leavenworth road, and make connections in the limits prescribed in the act.

Again, in the 14th Section of the Act, the Union ic is required to build a road from Sioux City to nection with its other lines when a road is built

through Minnesota or Iowa to that place. Still further, Section 15 provides that any railroad company then or thereafter incorporated shall have the right to connect its road with any of those mentioned therein at such point or points, and on such just and equitable terms as the President of the United States may prescribe.

And in Section 18 of the Act of 1864, the Burlington & Missouri River Railroad Company is authorized to extend its road in Iowa into Nebraska, to a connection with the main trunk or with the Iowa branch. These clauses are of the utmost significance, and the purpose of inserting them in the acts is so obvious that nothing is left to inference. That purpose was by the connection of the Iowa and Missouri roads with the Union Pacific to establish through lines from the East to the West.

It was a great and splendid policy at that time, unexampled in railroad construction the world over. In these days of railroad consolidation, when the purpose of these acts in connecting the roads east of the river with those west of it has become a familiar and every-day object of railroad management, it is difficult to appreciate the foresight and wisdom of the statesmen who framed these acts; but if we can realize the conditions and prevalent ideas of those

times, we cannot help being impressed with the grandeur of the conception of a system of transportation extending from state to state, and from the Atlantic to the Pacific.

The Act of 1871 has a large place in the process of the development of the scheme of the Pacific System. Its object is stated at the very beginning of its provisions. That object is "the more perfect connection of any railroads that are, or shall be, constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska." In the Act of 1864, we have a grant of power to bridge the river made to connect the roads east and west of it, and then we have the Act of 1871, intended to advance this object by a more perfect connection of these and other roads. The relation to one another of the three acts is very apparent; that of 1864 authorizing the bridging of the river, "to enable any one of said corporations to make convenient and necessary connections with other roads," and the Act of 1871 providing means with which the Union Pacific should build the bridge for the more perfect connection of all roads running from the east with those running from the west to the river at or near Council Bluffs and Omaha. Considering the purpose of that Act in connection with the grant of power to build the bridge,

it is very obvious that it must be taken as an amendment of the earlier acts, and therefore they are to be read together as one. It results that the clause in the Act of 1862 requiring the insertion of the words "its associates, successors and assigns," after the word "Company" wherever it occurs, applies to the provisions of the Act of 1871, so that it will read thus: "The Union Pacific Railroad, *its associates, successors and assigns*, be and are hereby authorized to issue its bonds and to secure the same by mortgage," * * "and for the use and protection of said bridge and property the Union Pacific Railroad Company, *its associates, successors and assigns*, shall be empowered, governed and limited by the provisions of the Act" of 1866, which, "for the more perfect connection of any railroads that are or shall be constructed to said river, at or opposite said point," that is, Council Bluffs and Omaha, provides that "trains of all roads terminating at said river shall be allowed to cross said bridge for reasonable compensation."

Thus read, the Act of 1871 extends to the present Company, as the successor of the Union Pacific, all of the burdens, obligations and duties imposed upon the first Company just as effectively as if they were named in the Act. It was under the powers granted

the Act of 1871 that the successor Company (Second Pacific Company) made the renewal bridge mortgage of 1885.

But there is another conclusive reason why the Act of 1871 was an amendment to the Act of 1862, and therefore they must be read together. Section 5 of the Act of 1862 provided that the government lien of $16,000 per mile for subsidy bonds should be the first lien upon the road.

Act of 1871 an Amendment to Pacific Railroad Acts.

Section 10 of the Act of 1864 permitted the Union Pacific Railroad Company to issue its first mortgage bonds to an amount not exceeding the government bonds, i. e., $16,000 a mile. As the law stood in 1871 the Union Pacific Railway Company was without money to build the bridge, and could only obtain $16,000 of first mortgage, and $16,000 of government subsidy bonds. The Act of 1871 in effect amended this law, and permitted the Union Pacific to make a first mortgage upon the bridge, its approaches, and the depots and tracks connected therewith, which amounted to two and a half million dollars.

While the act does not in so many words say that the Union Pacific is authorized to make a first mortgage upon the bridge, Judge Sanborn held in the receivership proceedings that such was its effect. Record, Vol. 1, page 351.

It is a general rule that where a subsequent act necessarily modifies or changes a prior act, it is to be construed as an amendment, whether so designated in the act or not.

Smails v. White, 4 Neb. 357.
Sovereign v. State, 7 Neb. 409.
In re McKeon's Estate, 58 N. Y. Sup., p. 589.
Fussell v. Gregg, 113 U. S. 550.
United States v. Freeman, 3 Howard, 548.
Atkins v. Disintegrating Co., 18 Wall. 301.
State v. Gerhardt, 33 L. R. A., 313, 322 (Ind.)

Policy of Congress to make Bridge Acts binding on successor companies.

We now pass to considerations of another character. It seems to us hardly conceivable that it should be claimed that Congress intended by the Act of 1871 to accomplish the great purpose of making connections across this bridge and its approaches between the eastern and western lines, and simply made the covenant binding upon the First Pacific Company, knowing that its property was then mortgaged under the Act of 1862 and 1864, and that the mortgage might be foreclosed and the property sold out and this object defeated at any time. Not only that, but the very Act of 1871 which created the right authorized a mortgage upon the bridge, its approaches, tracks and depots connected therewith. Was it the intention of Congress by the very act

creating this public right to also furnish the means of destroying it? Was it intended to be a personal covenant of the First Pacific Company which might be cut off by the foreclosure of a mortgage within a year? Can it be supposed for one moment that Congress in these various Pacific acts and other acts extending the policy to all roads in the country crossing state lines should establish, develop and emphasize this policy on the one hand, and on the other, in the very same acts, provide that the company could execute a mortgage which could be foreclosed upon a default happening, and the property be sold and the purchaser be relieved from the obligations and duties imposed upon the original company? The power that created this easement, according to our adversaries, provided at the same time for its destruction.

What becomes of the great object of Congress in connecting the lines of road which then were or might thereafter be constructed to opposite banks of the Missouri River? Was it a policy of a day, to be destroyed by change of ownership of the line of road or the insolvency of the original corporation? A more careful consideration of the Act of 1871 and the other bridge acts will show that it was the intention of Congress to create an easement in the property for the benefit of any road coming within

the description of the Act that should thereafter desire to run its trains over the bridge, its approaches and the tracks connected therewith.

The Act of 1871 must be read as though the provision of the Act of 1866 had been incorporated in it. And the language of that act, after providing for the construction of the bridge, is as follows:

> "for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that, when constructed, all trains of all roads terminating at said river at or opposite said point, shall be allowed to cross said bridge for reasonable compensation to be made to the owners of said bridge," etc.

It will be here noted that this is for the more perfect connection of roads to be thereafter constructed, and that this language runs (if we may be allowed to use the expression) against the bridge. It is an obligation for an easement imposed upon the property, not upon the corporate entity.

Could it be claimed with any degree of reason that the bridge built under Section 1 of the Act of 1866 was subject to the use by other companies simply so long as it should remain in the hands of the

original persons or corporation constructing it, or that all the other bridges authorized by the eight different sections were simply obligated during the time they should remain the property of the original incorporation or persons authorized to construct them? What was meant by the Act of 1871 was that the bridge, approaches, depots and tracks connected therewith necessary to be used for the purpose of making connections between the eastern and western lines should be governed by the Act of 1866 as to the use by other roads.

It was also provided in the act that Congress should at all times have power to regulate the bridge, and the rates for transportation of freight over the same, and the local travel therein provided for. How could Congress regulate the bridge if the provisions of this act would not apply to a purchaser under a foreclosure?

Strong light is thrown upon the intention of Congress by an examination of the other bridge acts authorizing the construction of bridges across navigable streams and providing for their use by other companies. We have examined with care a large number of these acts, and we have yet to find one that in its terms provides that these obligations as to use by other companies shall be binding upon the suc-

cessors in interest, grantees, assigns, or anyone else. A number of these acts are cited in the opinion of Judge Sanborn in the Rock Island bridge case, and in the same case in the opinion of Chief Justice Fuller in the Supreme Court of the United States. We refer the Court to Appendix "B" of this brief, wherein will be found a large number of said bridge acts extending over a period of more than fifty years, and they are all substantially in the same form. These numerous acts are not only strong evidence of the intention of Congress to make these bridges general highways, but they evince the further intention of Congress that they shall always remain so in whose ever hands they may come. Congress has carefully preserved the great waterways, and favors the public interests to have as few bridges as possible consistent with the railroad transportation of the country. It is not only a waste of money—which ultimately must be paid by the people—but an injury to the public for every railroad to construct a bridge. How better could Congress maintain these open highways than in providing in these acts that they should be subject to the use of other railway companies? It would certainly do violence to the intention of Congress, evidenced by these Acts, if this right to have these bridges preserved as highways might be taken

away by the foreclosure of a mortgage, or the sale or lease of the property. We suggest that the consequences which would follow upon a decision that these obligations imposed by Congress as to the use of this bridge were mere personal covenants, and not binding upon the successors or grantees of the first company, would be most serious.

While we recognize the fact that if the Court is convinced beyond doubt that a proposition of law is correct it should so declare without reference to the consequences, yet, where the question may be considered doubtful, the grave consequences that might follow such a decision are entitled to the greatest weight.

Consider for a moment the consequences which would follow a decision that these obligations as to the use are only binding upon the original party constructing the bridge under the Acts of Congress. Nearly every bridge of importance constructed in the United States across the great waterways has passed from its original owner to grantees or lessees, either by foreclosure of mortgage or by voluntary transfer. Most of them are to-day used as common highways by other railways than the owners. Commerce between states has been largely facilitated by the construction of these bridges and the imposition of these

obligations as to their use. If the contention of counsel for appellant is true, all that Congress has done heretofore, all that the railroad companies have conceded under these acts, and all that is being done to-day, falls to the ground, and the grantee or lessee of any one of these bridges may immediately close this avenue of commerce to any railroad company using the same or desiring to use the same, unless such company is entitled to the use under a valid contract.

Over and over again have the courts of this country announced the salutary rule that commerce should be fostered rather than hindered. It has been the policy of Congress, it has been the policy of the courts, and certainly there is no reason why this policy should be reversed in this case.

Railroad companies should be held to a strict account in carrying out their obligations to facilitate commerce.

The language of Mr. Justice Brewer, quoted in the *Rock Island* case, on page 604, is peculiarly significant when applied to the question at bar.

> "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations, that no change of interest or change of management can disturb their sanc-

tity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their facilities, is potent to hold them to all their obligations and so make right and justice the measure of all corporate as well as individual action."

But again, passing to a consideration of the tripartite agreement, we find that that agreement was made expressly binding upon the Union Pacific Railroad Company, its successors and assigns. It was also included in the body of a deed forming a link in the chain of title of the Union Pacific Company. Any company that thereafter took said property and enjoyed its use became obligated by these covenants. It is not possible that the present Pacific Company could take the benefits of the $200,000 donated by the city to purchase the depot grounds, could use that property, and at the same time escape the obligations imposed upon its predecessor by the covenants of this agreement.

But these principles have been so thoroughly settled by the authorities, which we will now consider, as to no longer be open to serious controversy.

orities.

Joy v. St. Louis, 138 U. S. 1.

Whitney v. Union Ry. Co., 11 Gray, 359.

Union Pacific Ry. Co. v. McAlpine, 129 U. S. 306.

Parker v. Nightingale, 6 Allen, 341.

Lake Erie & Western Ry. Co. v. Priest, 131 Ind. 413; 31 N. E. 77.

Midland Ry. Co. v. Fisher, 125 Ind. 19; 24 N. E. 756.

Bronson v. Coffin, 108 Mass. 175.

Kirkpatrick v. Peshine, 24 N. J. Eq. 206.

2 Pom. Eq. Juris., Secs. 689 and 1295.

Talmadge v. East Riv. Bank, 26 N. Y. 105.

Opinion of Atty. Genl. Griggs, 22 Opinions Attys. Genl. 398.

Commonwealth v. Hancock Free Bridge Co., 2 Gray, 58.

South & North Ala. Ry. v. Highland Belt Ry., 23 So. (Ala.) 973.

Wade v. Chicago, Springfield, Etc. R. R., 149 U. S. 327.

Union Depot Co. v. Southern Ry. Co., 105 Mo. 602; 16 S. W. 920.

State v. Central Iowa Ry., 71 Ia. 410; 32 N. W. 409.

Kettle River R. R. Co. v. Eastern Ry. Co., 41 Minn. 461.

Tulk v. Moxhay, 2 Phillips, 774.

Luker v. Dennis, 7 Ch. Div. 227.

Chicago, St. P. & Kansas City Ry. v. Kansas City, St. Joseph & Council Bluffs Ry. Co., 38 Fed. 58.

Same case, 52 Fed. 178.

Chicago, Milwaukee & St. Paul Ry. v. Chicago, 183 Ill. 341.

Joy case.

In the case of *Joy v. St. Louis*, 138 U. S., page 1, only does the Court dispose of this question, but stantially all of the questions which can be raised his case against the enforcement of the right we and. In that case the railroad company, which herein designated as the "County Company," ined a deed of a right of way seventy feet in th across certain property which thereafter be- e a part of Forest Park in St. Louis. It also ac- ed certain detached lots between the Union ot and the Park. After the acquisition of this of way the legislature authorized the establish- of Forest Park. The County Company made tract with the Kansas City Company to sell it a of its right of way outside of the park, and pro- that the right of way through the park should common. This contract was not acknowledged

or put on record. It thereupon made a deed of the right of way, and also in the deed provided as follows, page 36:

> "And also the said party of the first part hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer, unto the said party of the second part and to its successors and assigns, an undivided one-half of all the right, title or interest of the party of the first part of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities, owned by or vested in, or enjoyed by, or that may hereafter be acquired and owned by, vested in, or enjoyed by, the party of the first part, in, through or upon Forest Park, by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part."

This deed was recorded August 13, 1875.

We now come to the agreement which was sought to be enforced by the Colorado Company. It was made on the same day the contract was made between the County Company and the Kansas City

Company, and on the same day the foregoing deed was made, to-wit, August 11, 1875. The Board of Park Commissioners were the parties of the first part, the County Company party of the second part, and the Kansas City Company party of the third part. There are various stipulations in this instrument unnecessary to recite, but among other things it was agreed that the County Company should reduce the right of way from seventy to forty-two feet, and various stipulations made as to the manner of constructing the road through the park. The ninth subdivision is the one in question, and is as follows, page 31:

> "*Ninth. Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park, and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such Companies.*"

The party of the second part agreeing to allow ny other Company to use this right of way was the ounty Company. Now, it will be noted that the ounty Company did not own all of the right of way o to the depot, but only detached lots. It was

agreed in the first contract, between the County Company and the Kansas City Company, that the County Company should pay a certain sum to the Kansas City Company, and upon failure so to do should forfeit to the Kansas City Company its right of way, franchises, etc. It failed to make the payments, and the Kansas City Company acquired all of the right of way through the park and the detached portions up to the Union Depot, together with all the rights under this tripartite agreement, so that the Kansas City Company took the place of the County Company. Subsequently the Kansas City Company was consolidated with the Wabash Company under the name of the Wabash, St. Louis & Pacific Railway Company. It made a mortgage on all its property to certain trustees; these trustees brought suit to foreclose the mortgage, a receiver was appointed, and the property was sold to Joy, Hubbard, Wells and Ashley, a purchasing committee. Thereupon the Colorado Company filed its petition in the United States Court, asking to have this clause under the ninth subdivision in the tripartite agreement enforced in its favor, and a mandatory injunction issued commanding the owners of the railroad to allow it to run its trains through said park, and over the right of way owned by the Wabash Company to the

Union Depot. The Circuit Court enforced the stipulation. An examination of various assignments of error which are stated in the argument by Mr. Wells H. Blodgett will show that Joy and the other purchasers of the railroad claimed that the contract was not binding upon Joy and his associates, they being purchasers in good faith, and without notice of the stipulation in the tripartite agreement (page 26). It was also claimed that there was no mutuality in the agreement; that it was too indefinite to be enforced; that it did not create an equitable easement; that the County Company (the one that contracted to allow any other railroad company to use the right of way) only owned the right of way through the park, and did not own the right of way from the park to the Union Depot, but that this belonged to the Kansas City Company, and therefore it could not be included. We shall not attempt to state all of the objections in this brief statement of the case. The case is a leading one, and the opinion was by Mr. Justice Blatchford, and was the unanimous opinion of the Court. The Court held that the contract applied to the entire right of way from the park to the Union Depot. As to it being binding upon the Kansas City Company, the Wabash Company, and the purchasers under the Wabash mortgage, the Court held that

although the contracts were not of record, that the deed from the County Company to the Kansas City Company was of record, and that it sufficiently referred to the right of way through the park to place any purchaser upon inquiry, and that the terms and conditions of this tripartite agreement bound the purchasing committee whether it was a covenant running with the land or not. The Court also held that it created an easement which might be enforced in favor of any company; that contracts of such a character should be liberally construed in favor of the public when the subject-matter concerns the public; that the Kansas City Company was the successor of the County Company, and that the agreement attached to and bound the entire right of way, not only through the park, but to the Union Depot. The entire opinion is instructive, but we shall only quote some portions of it in this brief. The Court said, page 34:

> "We are also of opinion that the covenants in paragraph 9 of the tripartite agreement, as to the use of the right of way by other railroad companies, are binding upon subsequent purchasers, with notice, from the Kansas City Company. *Tulk v. Moxhay*, 2 Phillips, 774; *Luker v. Dennis*, 7 Ch. D. 227; *Bron-*

son v. Coffin, 108 Mass. 175; *Whitney v. Union Ry. Co.*, 11 Gray, 359, 364; *Parker v. Nightingale*, 6 Allen, 341, 344; *Vandoran v. Robinson*, 16 N. J. Eq. 256; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Western v. Macdermott*, L. R. 2 Ch. 72; *Watertown v. White*, 4 Paige, 510; *Randall v. Latham*, 36 Ct. 48, 53; *City of Cincinnati v. Lessees of White*, 6 Pet. 431; *Brew v. Van Deman*, 6 Heiskell, 433; *Winfield v. Henning*, 21 N. J. Eq. 188; *Verplanck v. Wright*, 23 Wend. 506; *Stockett v. Howard*, 34 Md. 121; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35.

"In the present case the tripartite agreement is a link in the chain of title of the mortgagees and of the purchasing committee. The right of way through the park, granted by Griswold to the County Company, November 3, 1871, was lost by non-user. The right of way granted by the Park Commissioners to the County Company under the First Park Act, of March 25, 1872, failed because the act was declared unconstitutional, in *Chouteau v. Leffingwell*, 54 Mo. 458. The third line, that established by the tripartite agreement, was not identical with either of the two prior lines.

The Park Commissioners, therefore, granted to the two companies, under the tripartite agreement, all the right of way which they acquired in the park. The right of the mortgagees and of the purchasing committee to use such right of way is based solely upon that agreement; and, holding under it, they must hold subject to its terms and conditions, irrespectively of the question of notice. *Whitney v. Union Railway Co.*, 11 Gray, 359; *Vandoran v. Robinson*, 16 N. J. Eq. 256; *Tulk v. Moxhay*, 2 Phillips, 774; *Luker v. Dennis*, 7 Ch. D. 227; *Western v. Macdermott*, L. R. 2 Ch. 72. Therefore, the Wabash Company, the mortgagees and the purchasing committee must be held to have had notice of the covenants and conditions of the tripartite agreement prior to the execution of the mortgage, and are bound by them, whether the covenants be or be not strictly such as run with the land."

Bearing upon this question of notice the Court held that the deed, being of record and referring to the tripartite agreement in the clause we have quoted in this brief, in substance assigning and transferring to the Kansas City Company an undivided half of the

right, title, franchises and privileges through Forest Park, was sufficient notice to the purchasers of the source of the right and the terms and conditions of the contract granting the right of way through the park as to place the purchasers upon inquiry. But in addition to this, the tripartite agreement was a link in the chain of title of the mortgagees and of the purchasing committee, and therefore they were bound by its terms irrespective of the question of notice. That case absolutely disposes of the claim of the appellant in this case to be relieved from the obligations of the Act of Congress and of the tripartite agreement.

It is argued by the appellant that the mortgage in the Joy case was made *after* the tripartite agreement. As we will hereafter show, that is entirely immaterial. Because, if the mortgagee took the property without notice, then, unless the covenants were such as to be binding upon the successors or grantees of the original company, it would be relieved of those obligations. In other words, it is entirely immaterial whether the mortgage was made before or after the creation of the obligation, for the reason:

First. The tripartite agreement between the city, the county and the railroad company was spe-

cifically made binding upon its successors and is a link in the chain of title of the present company. And,

Second. The Act of Congress and the tripartite agreement created an easement in the property of the Union Pacific Company that all purchasers or persons acquiring the property in any manner, having notice of this easement, took it subject to those obligations. It will not be denied that the Union Pacific Company had notice of the Act of Congress, that it was passed before the property under consideration came into existence. It was also a link in the chain of title of the defendant company. It applies to the bridge and approaches in whosesoever hands they may come, and whoever may be the owner.

If the very vague reference to the tripartite agreement in the deed of August 17, 1875, in the Joy case was sufficient to place any purchaser upon inquiry as to the obligations of the tripartite agreement in that case, certainly the Act of Congress and the Saunders deed are sufficient to place this defendant upon inquiry. It will also be noted in the Joy case that the clause in the agreement which the Court was enforcing, was simply on its face an obligation of the County Company. It provided, "said party of the second part shall permit" other railroads to

use its right of way through the park and up to the terminus of the road in St. Louis. It did not, in language, apply to the successors, while the tripartite agreement in this case between the city, the county and the railroad company specifically applies to the successors of the First Pacific Company.

Again, the Second Pacific Company undertook to organize a Union Depot Company, and to sell the depot grounds covered by this contract to said Union Depot Company, and to procure from the city a release of the obligation contained in the Saunders deed. One Stuht brought a suit in the District Court of Douglas County to enjoin the city from releasing said obligation to the said Union Pacific Railroad Company and enjoin the Depot company from receiving said property. The Court there held that these stipulations were binding upon any company or purchaser of this depot property. The record of that case will be found on page 212, *et seq.*, Volume 1, of the Record. The opinion of the Court, from which we wish to quote, will be found on page 242, Volume 1, of the Record. The Court said:

> "We do not think that under the Saunders conveyance to the Railroad Company, that this requires that Company always to own and possess the land; but simply that

said land shall be used for the purposes expressed in the contract and deed of 1872. If the Company transfers the same to the defendant, the Union Depot Company, under the same conditions and limitations, and the premises are used for these purposes with the admission of all connecting roads to the benefit of terminal facilities and other conditions of said trust be complied with, there would in such case be no violation of the conditions and no reversion. It is not of much moment as to who occupies the ground in question. The sole object of the people in making this grant to the Company was to obtain the objects expressed in the contract and deed of 1872, and so long as this is obtained there can be no reversion, no matter who owns or possesses the premises."

Opinion of Attorney General Griggs.

In considering the Pacific Railroad Acts Attorney General Griggs held that the clause in the Pacific Charter requiring the Union Pacific Railroad Company to allow any other railroad company to connect with its road is binding upon any purchaser. He said, Volume 22, Opinions of Attorneys General, 399, 400:

"The provisions requiring these Companies to furnish communication and transportation over these lines when required, and giving to the Government a preference in the use of the railroad and telegraph lines for communication and transportation, and at rates not to exceed those paid by private persons for like services; and the requirement that these railroads and telegraph lines shall be kept constantly in repair and use, and that the whole line of the respective railroads and telegraphs and the branches (of which the road here in question is one) shall be operated, as far as the Government and the public are concerned, as one continuous line of telegraph and railroad; the provision that any other railroad company may connect its road with those authorized by these Acts, upon just and fair terms; the provision that whenever the net earnings of a railroad and telegraph line exceed 10 per cent the Congress may reduce the rates to be charged; and the provisions intended to prevent a monopoly, requiring the companies to permit connections of other telegraph lines and to afford facilities for telegraphing over railroad lines of telegraph—all

these and other requirements and provisions of these Acts of Congress are clearly permanent in character, of indefinite duration, and are not discharged by any alienation of the property, but go with it into whosever hands it may go, and are equally obligatory upon every owner."

It is immaterial to this case whether these covenants are such as run with the land or not. Covenants creating an easement which do run with the land are binding upon all purchasers, and covenants not running with the land are always binding upon purchasers with notice, provided they have reference to the use of the property. The Joy case would seem to place this beyond any question, but we have other authority.

C. M. & St. P. Ry. v. Chicago.

In the case of *Chicago, Milwaukee & St. Paul Ry. Company v. Chicago*, 183 Ill. 341, it was held that the obligations imposed upon a railway company authorized to construct its road over and across streets were binding upon the purchaser of the road. The Court said, page 347:

"The appellant, the Pittsburg Company, in a separate argument, contends that it is not liable, under the contract created by the ordinance granting the rights and privileges

to the Columbus Company, to lay and operate its tracks and road in said streets of the city; that it is a mere purchaser of the road and property of the Columbus Company and is not bound by the latter's individual contracts. We cannot concur in this view. The right to construct and operate its road was granted to the Columbus Company and its successors on the express condition that the Columbus Company would do and perform the things required of it by the ordinance. The Pittsburg Company succeeded to all the rights and privileges granted by the ordinance, has exercised and continues to exercise such rights and privileges, and it must perform the conditions annexed to the grant and upon which the exercise of such grant depends. The right to occupy and use this public street was granted on certain conditions imposed for the public safety and convenience, and appellant cannot exercise the right without liability to assume the burden."

Whitney v. Union Railway Co.

In the case of *Whitney v. Union Railway Company*, 11 Gray, page 359, Mr. Justice Bigelow stated the rule as follows, page 363:

"Upon this point the better opinion would seem to be that such agreements are valid, and capable of being enforced in equity against all those who take the estate with notice of them, although they may not be, strictly speaking, real covenants so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed. * * * In this view the precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform."

Parker v. Nightingale.

In the case of *Parker v. Nightingale*, 6 Allen, page 341, the owners of a piece of land agreed verbally between themselves that the property should be laid out into dwelling lots, and that "no other building except one of brick or stone, not less than three stories in height, and for a dwelling house only,"

should be erected by them. The deeds of the lots from the individual owners were made subject to this condition. One Nightingale acquired a lease of one of the houses, and undertook to convert it into a restaurant. Certain other owners of the property proceeded in equity to obtain an injunction. The Court said, page 345:

> "A purchaser of land with notice of a right or interest in it existing only by agreement with his vendor is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate, of which he had notice when he became the purchaser. In such cases it is true that the aggrieved party can often have no remedy at law. There may be neither privity of estate nor privity of contract between himself and those who attempt to appropriate property in contravention of the use or mode of enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him. But it is none the less contrary to equity that those to whom the estate comes, with notice of the rights of another

respecting it, should willfully disregard them, and in the absence of any remedy at law the stronger is the necessity of affording in such cases equitable relief, if it can be given consistently with public policy, and without violating any absolute rule of law. These principles were fully explained and applied by this Court in the recent case of *Whitney v. Union Railway*, 11 Gray, 359, and are constantly acted upon by the Court of Chancery in England and by the courts of this country exercising equity powers. *Mann v. Stephens*, 15 Sim. 377; *Tulk v. Moxhay*, 11 Beav. 571, and 2 Phillips R. 774, and 1 Hall & Twells, 105; *Patching v. Dubbins*, Kay, 1; *Coles v. Simms*, 5 De G., Macn. & Gord. 1, and 1 Kay, 56; *Piggot v. Stratton*, De G., Fisher & Jones, 33."

Kirkpatrick v. Peshine.

In the case of *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206, the owners of a certain tract of land sold a building lot, and agreed in the contract of sale that if any other building lots in that tract were sold they would be subject to the condition that the building was to set back twelve feet from the line of a street. Subsequent sales were made, and under one of those sales a party undertook to erect a building nearer than twelve feet from the street. The first

purchaser procured an injunction. Chancellor Runyon, writing the opinion, said, page 213:

> "The agreement between Messrs. Mackin, McClane and Keasbey with the complainant is one to which equity will give effect as against a subsequent grantee, with notice. It is one of that class of cases in which equity will charge the conscience of a grantee of land with an agreement relating to the land although the agreement neither creates an easement nor runs with the land. The jurisdiction of courts of equity over contracts and covenants is not confined to cases where an action at law can be maintained, but extends to cases where an action at law is not maintainable. Covenants controlling the enjoyment of land, though not binding at law, will be enforced in equity, provided the person into whose hands the land passes has taken it with the notice of the covenants. *Kerr on Injunctions*, 530; *Sugden on Vendors*, 596. 'The question,' said Lord Cottenham, in *Tulk v. Moxhay*, 2 Ph. 774, 'is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent

with the contract entered into by his vendor, and with notice of which he purchased.'

" 'Reason and justice,' said Lord Justice Knight Bruce, in *DeMattos v. Gibson*, 4 De G. & J. 282, 'seem to prescribe, that at least, as a general rule, where a man, by gift, or purchase, acquires property from another, with knowledge of a previous contract, lawfully, and for a valuable consideration, made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use the property in a manner not allowable to the giver or seller.' "

Commonwealth v. Hancock Free Bridge Corporation.

In the case of *Commonwealth v. Hancock Free Bridge Corporation*, 2 Gray, page 58, the Hancock Free Bridge Corporation was indicted for a failure to keep a certain public highway in Cambridge, Brighton and Watertown in repair. The question involved was whether, by purchase of the bridge and franchises from the West Boston Bridge Company, it became obligated to repair this highway. The West Boston Bridge Company was the owner of a toll bridge. Subsequent to its incorporation it was au-

thorized by the legislature to construct a road from Watertown to Cambridgeport, being a short section, less than a mile long, and it was provided in the Act that the towns of Watertown, Brighton and Cambridge should never be compelled to support any part of the highway. Subsequently, the Hancock Free Bridge Corporation was authorized to purchase "the West Boston Bridge, and the franchises thereof." The Court held that by the purchase of the bridge and its franchises it became obligated to fulfill the burdens cast upon the West Boston Bridge Company. The court said, page 64:

> "What then was it intended, by St. 1846, that the defendants should purchase, and that the proprietors of West Boston Bridge, as a chartered corporation, should sell, upon the terms proposed? Construing the concise terms used, with the obvious purpose and intent, we are of opinion that the subject of this transfer was the entire amount of the property, rights, privileges and powers held by them, as such corporations, subject to the duties and burdens necessarily incident thereto. But it is argued, on the part of the defendant corporation, that by the words, 'their bridge and the franchise thereof,' they mean bridge

as a structure, and the right or capacity to own it, and take toll upon it. But we think this by far too narrow, and not the true construction. 'The franchise of a bridge' as a structure would be unintelligible. Notwithstanding in critical nicety, the last antecedent of 'thereof,' is 'bridge,' and so it must be grammatically construed; yet such critical nicety cannot control the obvious intent of the legislature in the whole Act, to use the terms 'West Boston Bridge and the franchise thereof,' as *nomen generalissimum*, and thereby to include the entire chartered powers of the corporation.

"The argument for the defendants seems to be refuted by the original act itself. St. 1791, c. 62. The grant of power, in the first sentence, is to build a bridge from the westerly part of Boston to Pelham's Island in Cambridge. The Legislature well understood what was intended by a bridge structure, for they direct that it be well covered with plank or timber, with sufficient rails for the security of passengers. But they further direct that said corporation shall lay out and make a good road from Pelham's Island aforesaid to the

nearest part of the Cambridge road. This, it is understood, was a road or causeway, over marsh and flats nearly as long as the bridge itself, to be made at considerable expense, and without which the bridge itself would have been utterly useless. Was not the right of making this road, and the duty of making it, though no part of the bridge structure, within the franchise of the corporation?"

This case is clearly in point. It gave a liberal construction to the term "bridge and franchises," and held the burden to maintain this strip of highway across the marshy land was a franchise of the bridge, and, when the Hancock Free Bridge Company purchased it, it became obligated by the condition imposed upon its grantor.

IV.

Decree of foreclosure did not cut out this right.

But it is claimed by the appellant, that the decree of foreclosure cut out the rights of the public and of other railroad companies to run their trains over the bridge and its approaches, and that the present company purchased under that decree the property free and clear of any of the provisions of the tripartite agreement contained in the Saunders deed, and of the obligations imposed by the act of Congress.

We think we have sufficiently demonstrated the fallacy of this argument. There are several reasons which may be given as a complete answer to this proposition.

First. Neither the city, the county, nor the complainant railway company were parties to the suit, and therefore, of course, could not be affected by the decree. There is absolutely nothing in the decree which could in the slightest degree be construed to affect this public right or easement. It adhered to and was appurtenant to the property and passed with it to the purchaser. Neither would it have been possible for the Court to have made a decree which

could have affected this right. The question was considered by Judge Sanborn in the foreclosure of this mortgage. It was urged by the government in that case that the master erred because he did not report that the railway was subject to the provisions of the first sentence of the fifteenth section of the Act of July 1, 1862, which provides as follows:

> "That any other railroad company now incorporated or hereafter to be incorporated shall have the right to connect their road with the road or branches provided by this act, at such places and upon such terms as the President of the United States may prescribe."

Upon this question Judge Sanborn held as follows—Record page 356:

Judge Sanborn's opinion in foreclosure case.

> "Finally, it is urged that the master erred because he did not report that the railway is subject to the provisions of the first sentence of the fifteenth section of the Act of July 1, 1862, which provides: 'That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this Act, at such places and upon such just and equitable terms as the

President of the United States may prescribe.' (12 Stats. at Large, Ch. 120, p. 496.)

"But this provision of the Act of Congress established no right or title and created no lien in favor of any of the parties to these suits. At most, it imposes a burden upon the franchises granted to the railroad company for the benefit of the public, and it stands like any other burden imposed upon one who accepts a franchise. It was the duty of the master, and it is that of the Court, to determine the amounts and the rank of the liens of the various parties to these suits. In the discharge of that duty it has been necessary to consider and decide whether or not the Government had a lien upon this railroad for the compensation for services rendered by it to the United States which was superior to that of the general first mortgage. But the character and extent of the franchises granted to the Union Pacific Railroad Company and its successors, by the United States, the benefits conferred and the burdens imposed upon them for the benefit of those who are not parties to these suits, are described and defined in the Acts of Congress with a clearness and ac-

curacy which the Court could not hope to rival, and it ought not to attempt to define them in the absence of the parties who are or may hereafter become pecuniarily interested in them. The provision of Section 15 in question was not enacted for the benefit of any of the parties to these suits, and it was properly omitted from the report of the master, because no issue relative to it has arisen herein. If this provision is a part of the franchise to operate this railroad, and if it imposes a burden inseparable from that franchise, the purchaser of the latter will take subject to that burden; if it is not a part of that franchise, and does not condition it, he will take free from this burden—and no opinion or decree of this Court in these cases could change that result in the absence of the parties that now are or may hereafter become pecuniarily interested in enforcing this provision. The exception upon this subject must be overruled."

In substance he held that no opinion or decree of is Court in the foreclosure case could affect the hts of any railroad thereafter undertaking to ence these covenants. The issues in the foreclosure re simply as to the priority of the liens and the

rights of the complainant to a foreclosure and a sale of the property. The Court did not nor could not have cut out the right of this complainant, or of the public, to compel the Union Pacific Railroad Company to carry out the terms of the bridge act or of the tripartite agreement. The reorganization committee took the property subject to this right.

Credits Commutation Case.

In the case of the *Credits Commutation Company v. the United States*, 177 U. S., 311, the Credits Commutation Company undertook to intervene and to raise the issue of whether the purchaser of the property would be bound by the clause above quoted as to connections with other lines. Mr. Justice Shiras in writing the opinion held that that issue was entirely immaterial to the foreclosure. He said:

> "The petitioners were under no obligation to intervene in the litigation against the Union Pacific Railway Company to preserve their alleged right to form a junction with the road of that company when they should have completed their own road to a suitable junction point. The question which they sought to litigate in the pending litigation could, we think, with more propriety and with less difficulty, have been litigated by an independent bill after they had completed, or were about

completing, their line to a suitable junction point. Prior to that time the questions which they sought to raise bv means of the intervening petitions were speculative questions which the lower Court, as we think very properly, refused to consider or determine."

Act of 1871 amendment to Pacific Railroad Act.

Second. The Act of 1871 was an amendment to the charter of the Union Pacific Railroad Company, granting to it certain franchises and privileges and providing the manner of the use of a certain part of its property for reasonable compensation. The original charter of the Union Pacific Railroad Company, Section 18, provided:

"And the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in the time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Companies named herein, add to, alter, amend or repeal this Act."

Under this reserve power, Congress undoubtedly had power to regulate the manner of the use of

said public highway for reasonable compensation and that is what was done by this Act.

Sinking Fund Cases, 99 U. S. 700.

Canada Southern Railway v. International Bridge Co., 8 Fed. Rep. 192.

New York & New England Railroad Company v. Bristol, 151 U. S. 567.

Tomlinson v. Jessup, 15 Wal. 459.

Miller v. State, 15 Wal. 498.

Railroad Company v. Maine, 96 U. S. 510.

Pearsall v. Great Northern Ry., 161 U. S. 646, 656.

Sinking Fund Cases.

In the Sinking Fund Cases Congress had by a subsequent Act, established a sinking fund to be taken from the earnings of the Union Pacific Railroad Company. It was claimed that this Act was unconstitutional. Mr. Chief Justice Waite, in delivering the opinion said:

> "This corporation is a creature of the United States. It is a private corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control so far as its business affects the public interests. *Chicago, Burlington & Quincy Railroad Co. v. Iowa*, 94 U. S. 155. It is unnecessary to de-

cide what power Congress would have had over the charter if the right of amendment had not been reserved; for, as we think, that reservation has been made. In the Act of 1862, Sec. 18, it was accompanied by an explanatory statement showing that this had been done 'the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but especially in time of war) the use and benefits of the same for postal, military and other purposes,' and by an injunction that it should be used with 'due regard for the rights of said Companies.' In the Act of 1864, however, there is nothing except the simple words (Sec. 22) 'that Congress may at any time alter, amend and repeal this Act.' Taking both Acts together, and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of

the charter as come within the just scope of legislative power.

"Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say that, whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment."

omlinson v. essup, 15 Wal. 454.

In the case of *Tomlinson v. Jessup*, Mr. Justice Field, speaking for the Supreme Court, said:

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

Railroad v. Maine, 96 U. S. 510.

In *Railroad Co. v. Maine*, the Supreme Court of the United States had under consideration the same question. By a general law of Maine, it was provided that all charters thereafter passed were subject to be amended, altered or repealed. A special charter was thereafter granted to various railroad companies which were consolidated into the Maine Central Railroad Company. The court held the consolidated company's charter subject to amendment,

alteration and repeal; that, although the general provision of the statute to that effect might be disregarded by subsequent legislatures, still, until so repealed, it must be construed to have entered into and become a part of each subsequent charter; and the court said:

> "By the reservation in the law of 1831, which is to be considered as if embodied in that act, the State retained the power to alter it in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges and immunities. The existence of the corporation, and its franchises and immunities, derived directly from the State, were thus kept under its control."

In the case of *Pearsall v. Great Northern Railway*, 161 U. S. 646, this court held that the charter of the Great Northern Railway Company, authorizing it to purchase parallel and competing lines, was subject to amendment and repeal by the Legislature, in the exercise of its police power, in pursuance of the general public policy, although no reservation to alter, amend and repeal was contained in the original charter of the company.

It was held in the *Rock Island* case, 163 U. S., page 589, that the Union Pacific Company parted

with no property or franchise in making the contract to allow the Rock Island Company to run its trains over the bridge and its approaches; that it did not "alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit, so far as that use was concerned."

We take it to be self-evident that, under this reserve power, Congress could have imposed upon the Union Pacific Company this obligation (if it may be deemed an obligation) without the granting of any franchises, rights and privileges as was done by the Act of 1871. In the Court of Appeals the counsel conceded this position (page 80 of his brief), but argued that Congress could not do this as against the first mortgage bondholders. Let us inquire how the first mortgage bondholders could be injured. This Act did not take from the Union Pacific any property without compensation; it impaired the obligation of no contract; it regulated the use of that property, as the Court said, for compensation. Reasonable compensation is all the Union Pacific Company would be entitled to if it hauled the freight of the complainant Company with its own engines and

ars, and reasonable compensation it was granted nder this Act of Congress. The first mortgage was ıade and accepted subject to all of the limitations, eservations and power of amendment, supervision nd control by the Congress of the United States.

Third. When the Act of Congress of 1871 was assed and the bonds voted by the city and the ounty, the tripartite agreement made, and the depot roperty deeded to the Union Pacific Railroad Comany, the bridge, its approaches and the tracks conected therewith between Council Bluffs and Twenieth street were not constructed, and hence were ot covered by the first mortgage or the lien of the overnment. In fact no bonds for the construction f this road were ever issued under the Government ıortgage or the first mortgage. Under this Act of 871 the money was procured with which to conruct this line of road and the bridge and depots, ith the exception of that donated by the city and ıe county. When the property was therefore rought into existence and the Union Pacific mortage and the Government mortgage attached, it was urdened with an easement (if it may be called a urden) requiring the railroad company and its sucessors to allow the trains of any other road to run ver that property and so much of the Union Pacific

Prior mortgage attaches to subsequent acquired property subject to easements.

Company's tracks as were necessary to connect the eastern with the western lines. The property was brought into existence by virtue of the privileges granted by Congress, and by the money raised by the city and the county; and when the first mortgage bondholders claimed a lien upon it, foreclosed the mortgage and took the property, they, of necessity, accepted that property burdened with the easements imposed by the donators and by Congress. A party cannot take property and enjoy its benefits, and at the same time escape the burdens. It will not do to say that the property constructed under the Act of Congress was only to Twentieth street. As a consideration for this property and for the powers granted it to raise two and a half million dollars by mortgage, the Union Pacific Company agreed that so much of its tracks as were necessary to make the connections might be used by other companies. It was a mere regulation of the use; and by taking the property under foreclosure it took it burdened with all of the easements to the full extent.

Judge Sanborn's Opinion, Vol. 1, pages 352-3, Record.

Lake Erie & Western Ry. Co. v. Priest, 131 Indiana, 413; s. c., 31 N. E. 77.

Midland Ry. Co. v. Fisher, 125 Ind. 19; s. c., 24 N. E. 756.

Central Trust Co. v. Kneeland, 138 U. S. 414.

St. Joseph, Etc., Co. v. Chicago, Etc., Co., 89 Fed. 648.

In passing upon the priority of the bridge mortgages over the Government mortgage, Judge Sanborn said—Record page 352:

> "It is clear that when this mortgage was made neither the bondholders secured by the general first mortgage nor the Government had any lien upon the bridge or upon the Bridge Division of the present railroad, because neither of these were then in existence. It is equally plain that neither the Government nor these bondholders expected or intended that the security which they permitted the railroad company to offer in order to obtain the money to construct this bridge would be subordinate to their liens. The aggregate amount of the incumbrance upon the railroad, as it was then constructed, was more than $54,000,000. Neither the Government nor the holders of the first mortgage bonds could have intended or supposed that a third lien for $2,500,000 on four miles of this railroad, sub-

ject to their liens for $54,000,000, would induce purchasers to take these Bridge Mortgage bonds. On the other hand, it was plainly upon the theory that the mortgage of April 1, 1871, would constitute a first lien upon the bridge and its approaches, that Congress authorized—and the first mortgage bondholders acquiesced in—its execution, and that the holders of the bridge bonds purchased them and furnished the funds which built the bridge. It would be unjust, inequitable, and a violation of the faith upon which the bridge bonds were sold to permit the first mortgage bondholders or the Government now to displace the lien of the bridge bonds, to destroy their security, and to appropriate to themselves the valuable improvement produced by the funds realized from the sale of these bridge bonds."

St. Joseph Union Depot Co. v. C. R. I. & P. Ry.

In the case of the *St. Joseph Union Depot Co. v. The Chicago, Rock Island & Pacific Railway Company*, 89 Fed. 648, Judge Shiras, writing the opinion for the Court of Appeals, said:

"* * * It is true that the trust deed to the Metropolitan Company was executed before the contract between the Depot and

Kansas Companies; but, that being true, it is clear that the lien of the trust deed did not then attach to the property rights created by the depot contract, because the same were not in existence. If the lien of the trust deed ever attached to the right to use the depot, it could only do so through the clause in the deed relating to after-acquired property; and it is well settled that the lien of the trust deed, in such case, does not attach until the property is acquired as part of mortgaged estate, and will be subject to the rights of third parties existing therein or thereto, when it passes under the lien of the pre-existing mortgage or trust deed. *U. S. v. New Orleans & O. R. Co.*, 12 Wall. 362; *Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. 357.

"* * * * If the defendant, upon the completion of the purchase made at the foreclosure sale, had wholly abandoned the use of the depot facilities for the trains run over the Kansas lines, it might have had reason for claiming that it intended to take the property free from the obligations arising under the contract between the Depot and Kansas Companies; but this it did not do, but, on the

contrary, it continued to use the depot facilities for the Kansas trains, which it would have had no right to do, except as the successor of the Kansas Company; and, having thus availed itself of the benefits of the contract with the Depot Company, it must respond to the obligations therein contained."

Lake Erie & Western Ry. v. Priest.

This was also held in the case of *Lake Erie & Western Ry. Co. v. Priest*, 131 Ind. 413, 31 N. E. 78, in which the provision in a deed of land to a railroad company for a right of way that the grantee would maintain a fence, was binding upon a purchaser of the railroad under a foreclosure of a mortgage made prior to the time the deed was executed. The court said:

"The acceptance of the deed imposed a burden upon the land which was not only binding upon the original grantor but runs with the title and is equally binding upon all who claim through the original grantor. The fact that the mortgage was executed before the deed was made could not operate to give the mortgagee or those claiming under it any rights superior to the rights of the appellee the grantors."

Midland Ry. v. Fisher.

In the case of *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, the Supreme Court of Indiana held that the conveyance of a railroad right of way, reciting as the consideration thereof that the grantees should construct a fence on both sides of the track, was a covenant binding upon all the purchasers of the railroad and its franchises. This case contains a very elaborate discussion of the question.

Harris v. Youngstown Bridge Co.

This subject received consideration in the opinion of Judge Taft in the Circuit Court of Appeals of the Sixth Circuit in the case of *Harris v. Youngstown, Bridge Company*, 90 Fed. Rep. 328, in which the court, speaking of the limitations upon the doctrine that the prior mortgage will attach to all after-acquired property, said:

> "The chief is that the mortgagee of after-acquired property is not a purchaser for value, and cannot acquire an interest by way of lien greater than that which the mortgagor has himself acquired. The lien of the mortgage attaches to after-acquired property in the condition in which the mortgagor takes it from his vendor, and subject to all known liens and equities valid against the vendor, and also subject to all liens or equities valid against the vendee and mortgagor which arise in the act

of purchase or acquisition, and therefore necessarily qualify its scope and extent. Thus, a vendor's lien on the property, good against the mortgagor, is prior in right to that of the mortgagee under an after-acquired property clause. So, too, a purchase-money mortgage upon after-acquired property is not displaced by the lien of a prior mortgage of the mortgagor containing an after-acquired property clause, because in equity the purchaser is regarded as taking only the difference between the value of the property and the amount still due on the price. *U. S. v. New Orleans R. R.*, 12 Wall. 362. In cases of conditional sales to the mortgagor, the mortgagee, under the after-acquired property clause, obtains a lien subject to the same defeasance or forfeiture as that to which the title of his mortgagor is subject. *Fosdick v. Schall*, 99 U. S. 235, 251; *Myer v. Car Co.*, 102 U. S. 1; *Trust Co. v. Groome*, 2 U. S. App. 95, 105, 1 C. C. A. 133, 48 Fed. 868; *Loomis v. Railroad Co.*, 17 Fed. 301, 305. And it is even held that if the property comes into the hands of the mortgagor subject to a lien which is good against him, though, for want of formalities,

it is not good against his subsequently attaching creditors and third persons, it is nevertheless prior to the lien of a mortgagee under an after-acquired property clause."

In *Fosdick v. Schall*, 99 U. S. 251, Chief Justice Waite, speaking on this subject, said: Fosdick v. Schall.

"But as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired—no more, no less."

To the same effect is the case of the *United States v. New Orleans Ry.*, 12 Wall. 362. Mr. Justice Bradley said: U. S. v. New Orleans Ry.

"The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages, being prior in date to the bond given for the purchase money of these locomotives and cars and being expressly made to include after-acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of

the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended

for the protection of subsequent, not prior, purchasers and creditors."

See also *Bear Lake Irrigation Co. v. Garland*, 164 U. S. p. 16, opinion.

N. P. Ry. v. Townsend.

In this connection the case of *Northern Pacific Ry. Co. v. Townsend*, 23 Sup. Ct. Rep. 671, is entitled to consideration. In that case one Townsend claimed to have obtained title to a piece of the Northern Pacific right of way by adverse possession. The Supreme Court of the United States held that the right of way granted by Congress was a grant burdened with a public easement — that the property should be used for certain purposes, and that the company had no power to alien it so as to destroy this easement; hence it could not lose it by adverse possession. The case is in point here. The Union Pacific Railroad Company obtained the depot property, constructed the bridge, depot tracks, and tracks connected therewith, with a covenant as to the manner of its future use attached to it. It was in the nature of a public easement for the benefit of any other railway company that might wish to make connections in order to form through lines of railway, and for the benefit of the public, which would be incidentally benefited thereby. This public easement was inseparable from the property.

The mortgagee takes no more than the mortgagor had. His title is derivative. In the foreclosure proceedings he takes the property burdened with all the public franchises, easements and obligations, as distinguished from direct personal obligations like debts.

The counsel for appellant in his brief in the Court of Appeals (page 80) said that our position would be true if the defendant was a purchaser from the old Union Pacific Company, but seemed to think that under the prior mortgage the Third Pacific Co. got some peculiar right, or took the property free from its burden in some way that a purchaser would not. We would like to have explained how it is that a mortgagee can get something that the mortgagor did not have, or how by the foreclosure of a mortgage the purchaser thereunder could get a title superior to the title of the mortgagor so far as the property itself is concerned.

Defendant Company had actual notice of Act of Congress and Saunders Deed.

Fourth. Not only did the defendant company have constructive notice of the Act of Congress, and the tripartite agreement contained in the Saunders Deed, but it had actual notice. The Saunders Deed was found among the title papers of the Union Pacific Railroad Company. The whole subject of the obligations of the Second Pacific Company to the

public under the Act of Congress and the Saunders Deed was before the court several times. In 1894, J. Pierpont Morgan and Elisha F. Atkins, Trustees of the first bridge mortgage, filed their petition in the Ames case, Record, page 278, in which it set forth the obligations of the first mortgage, giving the Trustees the right to fix tolls, not only on the bridge and depots connected therewith, but on the lines of track required to connect the said bridge with the railroads having their terminus at Omaha and Council Bluffs, and asked that these tolls be set aside for the benefit of the Trustees of this mortgage. This was done by order of the Court,—Record, page 281.

Bridge Division operated separately.

After the commencement of the Dexter foreclosure, being the first mortgage upon the Union Pacific Railway, a petition was filed by the Receivers, asking for instructions as to the management of the bridge and property connected therewith, and the rates, and the disposition of the revenues arising from the operation of the said bridge and property. The Trustees of the first mortgage appeared in this proceeding, and an order was made requiring the Receivers to keep a separate account of the revenues to be derived from the tolls levied upon said bridge property, as directed by the mortgage.

Petition of receivers stating conditions attached to Saunders deed, and asking that depot contract with Burlington be set aside.

Again, the Receivers of the Union Pacific Company filed a petition in the Dexter foreclosure case, in which the following allegation appears, Record, page 290:

> "1. The Union Pacific Railroad Company acquired title to a large number of lots and blocks, and to certain parts of streets and alleys, in the City of Omaha, about the year 1872; which lots and blocks and parts of streets and alleys aggregated in amount 28 acres, or thereabouts; that said property was acquired under and by virtue of certain agreements with the City of Omaha and County of Douglas, Nebraska, and under certain conveyances made by the said City of Omaha, and by Alvin Saunders, Trustee, to said Union Pacific Railroad Company; which agreements and conveyances will more particularly and fully state the terms and conditions under which it has been claimed the said Union Pacific Railroad Company obtained and held title to said lands. Reference is hereby had to the said several agreements and conveyances, and leave is prayed that they and each of them may be read and exhibited on the hearing hereof, and that they may be made a part here-

of on such hearing with the same effect as if each thereof was herein pleaded and set out at length.

"2. That about the year 1872, said Union Pacific Railroad Company entered into the possession as owner and claimed title to said lots, blocks, streets and alleys, and thereafter continuously occupied said premises, and from time to time placed thereon large numbers of tracks, turnouts, switches, its freight station, built thereon a passenger station and expensive and valuable bridges and other facilities used for the operation of its line of railroad; that the east line of said grounds was adjacent to the immediate approaches to the bridge of the Union Pacific Railroad Company over the Missouri River, and that said grounds constituted a portion of the line of railroad of said railroad company between the main line thereof and the bridge over the Missouri River and the eastern terminus of said railroad at Council Bluffs, Iowa, and constituted and were and are a part of the premises since that time and now known as the Bridge Division of the Union Pacific Railway Company's property."

The petition then sets forth that an agreement had been made between the Union Pacific Railway Company and the Chicago, Burlington & Quincy Railway Company for an Omaha Union Depot; that a depot company had been organized; that stock had been subscribed by the two companies, and certain work had been done upon the depot; that on the 26th day of December, 1889, the Mayor and City Council of Omaha passed an ordinance providing for the conveyance of the depot property covered by the Saunders deed to the Omaha Union Depot Company; that thereupon one Stuht, and John D. Howe, brought a suit in the District Court of Douglas county against the Depot Company and the City, to enjoin and restrain the conveyance of said property, on the ground that the same was impressed with a trust in favor of the public. The petition prays that the agreement between the Union Pacific Railway Company and the Chicago, Burlington & Quincy Railway Company be set aside, and that the money be returned to the Union Pacific Company and the Burlington Company. In this petition Winslow S. Pierce appeared as Solicitor for F. Gordon Dexter, et al., Trustees under the mortgage under which the first foreclosure in this case took place,—Record, pages 317 and 318.

Upon hearing an order was made carrying out the petition,—Record, page 326.

Petition of receivers for leave to convey property to Bridge Terminal Co. Answer of the Burlington and Rock Island Companies thereto.

Again, on July 5, 1897, the Receivers of the Union Pacific Railway Company filed a petition in the Dexter Case, in which the Trustees of the Bridge Mortgage and the United States were also parties, in which the Receivers asked leave to enter into agreements with the Omaha Bridge & Terminal Railway Company to construct a Union Passenger Station in Omaha. The Rock Island and the Burlington Companies filed answers to this petition. The answer of the Burlington Company sets forth among other things its previous agreement for a Union Depot in Omaha, and sets forth in substance the voting of the bonds by the city and county to aid in the construction of the Union Pacific bridge, depot and terminals, and the conditions of the Saunders deed, under which said property was voted to the Union Pacific Railroad Company.—See subdivision 8, Answer, page 341, Record. It also sets forth the Stuht case brought against the Union Depot Company and the City of Omaha, in which an injunction was obtained, restraining the City from conveying the depot grounds to the Depot Company, and thereby attempting to release the conditions of the tripartite agreement contained in the Saunders deed. At-

tached to this answer is a copy of the decree in the Stuht case,—Record, page 348. The Rock Island answer was substantially similar. Thereafter, no proceedings were taken therein, except to dismiss the petition of the Receivers for the conveyance of said property. In this case, as in the others, the Trustees of the first mortgage, the Government of the United States, and all of the other parties to the Dexter and Ames cases were parties, and had knowledge of the fact; and Winslow S. Pierce was the attorney of the Trustees of the first mortgage.—See Pierce's testimony, Record, pages 514 and 515.

Reorganization of Union Pacific Railway Co.

Fifth. We now come to the manner of the transfer of the property of the Union Pacific Railway Company to the defendant, the Union Pacific Railroad Company. This was done pursuant to a plan and agreement of reorganization. We doubt very much the materiality of this evidence, for the reason that the Union Pacific Company undoubtedly took the property burdened with the conditions imposed by the Government for the benefit of the public, and the conditions imposed by the City and County, contained in the tripartite agreement. As the Saunders deed conveyed part of the property voted to the defendant company, it certainly could not take the property and use it without being bound by the con-

ditions imposed upon it; but it will take but little time to show that the organization of the present company was simply a reorganization by the stockholders and bondholders of the old company, and that the present company was not an innocent purchaser, taking the property free and clear from any conditions, even if it was possible for it to take and hold such property without being bound by the obligations imposed upon the property. The plan of reorganization is contained on pages 460 to 494 of the Record. It is called a "Plan of Reorganization of the Union Pacific Railway Company," and is signed by the Reorganization Committee, consisting of Louis Fitzgerald, Jacob H. Schiff, T. Jefferson Coolidge, Jr., Chauncey M. Depew, Marvin Hughitt and Oliver Ames, 2nd—Record, page 464. It recites the different securities of the Union Pacific Railway Company, including all of its capital stock, $60,868,-500—Record, page 469. It provides for the issue of new mortgage bonds of $100,000,000, 4 per cent preferred stock, $75,000,000, and common stock, $61,-000,000. It also provides that each common stockholder of the old company depositing his stock with the Committee, and paying $15 a share, shall receive preferred stock for the $15 per share, and share for share in the common stock of the new company for

the common stock of the old company—Record, page 477.

It appears by the testimony of Mr. Krech, who is Vice President of the Mercantile Trust Company, and who was Secretary of the Reorganization Committee, that out of a total of $60,868,500, there was deposited with the company $60,691,050 of the common stock, for which new stock was issued share for share, and that as to the balance (about $100,000) the assessment was paid by the Reorganization Committee, and preferred stock issued to them for the assessment, and common stock issued for all of the stock not so deposited, so that practically the shareholders of the old company were the shareholders in the new company. The plan of reorganization was an agreement between the various stockholders and bondholders for the mutual reorganization of the company.

We invite the Court's attention to the agreement of reorganization, found on pages 481 et seq. of the Record. It recites that it is an agreement between the Reorganization Committee and the holders of the bonds and stock of the Union Pacific Railway Company, and recites, among other things, that

> "Whereas, the parties of the first part have been, and hereby are, constituted a Com-

mittee for the reorganization of the affairs of the Union Pacific Railway Company proper, inclusive of its Kansas Pacific lines, and have formulated the annexed Plan for such reorganization."

Then follows the various agreements providing that the depositors of securities shall receive receipts therefor, and shall receive their new securities according to the plan; that such receipts shall not be transferable, except as provided by the agreement, and in such manner as the Committee shall approve. It also provides in substance that each depositor of stock or bonds shall transfer to the Committee such stocks and bonds, thereby vesting the Committee with such as absolute owner — Record, page 483. And by the second section, on page 484, each stockholder and security holder does assign and transfer, absolutely, to the Committee, his stock and securities, vesting the Committee with such as absolute owner. We invite the Court's attention to the powers contained in this clause. It authorizes the Committee to vote the stock; to terminate, dissolve or modify any trust or lease in whole or in part; to satisfy or compromise or settle any obligations against the Union Pacific Railway Company; to apply for receivers, or the removal of receivers of the

Railway Company; or for the termination of any receivership, and the delivery of any property to its owners; to enter into settlement of any litigation; and contains, also, the following specific powers—Record, pages 485 and 486:

> "with plenary power to enter into arrangements for decrees, or for facilitating or hastening the course of litigation, or in any way to promote the objects of the plan and the purposes of the Committee; to do whatever, in the judgment of the Committee, may be necessary to promote or to procure such joint or separate sales of any property or franchises herein concerned, as the Committee may deem desirable, wherever the same may be situated; to adjourn the sale of any property or franchises, or of any portion or lot thereof at discretion; to bid or to refrain from bidding at any sale, either public or private, either in separate lots or as a whole, for any property or franchise or any part thereof, whether or not owned, controlled or covered by any deposited security, including or excluding any particular rolling stock, or other property, real or personal, and at, before, or after, any such sale, to arrange and agree for the resale

of any portion of the property which the Committee may decide to sell rather than to retain; to hold any property or franchise purchased by the Committee either in its name or in the name of persons or corporations by it chosen for the purposes of this agreement, and to apply any security deposited hereunder in satisfaction of any bid, or towards obtaining funds for the satisfaction thereof; it being understood that the term property and franchises includes any and all railroads, railroad and other transportation lines, leaseholds, stock or other interests in corporations in which the Union Pacific Railway Company has any interest of any kind whatever, direct or indirect. The amount to be bid or paid by the Committee for any property or franchises shall be absolutely discretionary with it; and in case of the sale to others of any property or franchise the Committee may receive out of the proceeds of such sale or otherwise any dividend in any form accruing on any securities held by it."

The fifth subdivision gave the Committee full power to organize one or more new companies, or to use any existing company, for the purposes of reor-

ganization. We quote the fifth subdivision so far as important to this consideration,—Record, pages 488 and 489:

"The committee may procure the organization of one or more new companies, or may adopt or use any existing or future companies, and may cause to be made such consolidations, leases, sales or other arrangements, and may make or cause to be made such conveyances or transfers of any property or securities acquired by the Committee and take such other steps as the Committee may deem proper for the purpose of creating the new securities provided for in the plan, and carrying out all or any of the provisions thereof.

"The Committee may negotiate and agree with any and all companies or persons for obtaining or granting running powers, terminal facilities, exchanges of property, or any other conveniences which it may deem necessary or desirable to obtain or to grant, and may make contracts therefor binding upon such new company; and generally may authorize, ratify and make such purchases, contracts, stipulations or arrangements as will in its opinion operate directly or indirectly to aid in the

preservation, improvement, development or protection of any property of the Union Pacific Railway Company, or to prevent or avoid opposition to, or interference with, the successful execution hereof.

"The Committee may proceed under this agreement, or any part thereof, with or without foreclosure, and may exercise any power after foreclosure sale.

"Any action contemplated in the plan or agreement to be performed on or after completion of reorganization may be taken by the Committee at any time when it shall deem the reorganization advanced sufficiently to justify such course, and the Committee may defer, as it may deem necessary, the performance of any provision of the plan or agreement, or may refer such performance to the new company."

It appears by the testimony of Mr. Krech that he and Louis Fitzgerald bid in the property of the Union Pacific Railway Company at a foreclosure sale thereof under the first mortgage; that they bid it in for the benefit of the Reorganization Committee, and representing such Committee,—Record, page 498; that at the request of the Committee, and representing such Committee, they assigned their bid to the

defendant company, which company was organized as a part of the plan of reorganization, and by the Reorganization Committee,—Record, pages 498, 499. It also appears by the record that this bid was assigned—Record, page 418—and that, pursuant to said assignment, W. D. Cornish, the Master under the Dexter foreclosure sale, the Receivers, the Trustees of the first mortgage, Krech and Fitzgerald, and the Union Pacific Railway Company, joined in a deed of all of the property and franchises of the Railway Company to the new Union Pacific Railroad Company, organized for the purposes of this reorganization. The articles of incorporation of the new company were introduced in evidence, and will be found in the Record on page 501.

It also appears by the testimony of Alexander Millar, the Secretary of the company, Record, page 514, that Winslow S. Pierce was the first President of the new company; that Alvin W. Krech was the first Vice-President, and that W. D. Cornish was the next Vice-President, and still occupies that position. This was just what it is claimed to be—a reorganization of the Union Pacific Railway Company. Pierce testified that he had full knowledge of all of the proceedings of the Receivership, and the foreclosure, and the Stuht case, wherein the effect of

the Saunders deed was brought in question,—Record, page 514.

It is perfectly evident from this that the new company was a reorganization, and was not freed from any of the obligations imposed upon this property for the benefit of the public, and other railroad companies constructing their lines to the Missouri River at or near Council Bluffs and Omaha. It is perfectly evident that this defendant company does not occupy the position of an innocent purchaser, like one buying a piece of real estate without notice of an unrecorded mortgage or easement. To say that a railroad company, having imposed upon it certain public duties and obligations, can relieve itself of those duties by a reorganization and foreclosure in pursuance of a plan of reorganization like this, is at least an exceedingly radical doctrine.

Louisville Trust Co. v. Louisville, etc., Ry.

In the case of *Louisville Trust Co. v. Louisville, etc., Ry. Co.*, 174 U. S. 674, Mr. Justice Brewer said, pages 683 and 684:

> "We do not stop to inquire, because the question is not presented by this record, whether a Court is justified in permitting a foreclosure and sale which leaves any interest in the mortgagor, to-wit, the railroad company and its stockholders, and ought not always to

require an extinction of all the mortgagor's interest and a full transfer to the mortgagee, representing the bondholders. Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders, he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate

rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

Authorities.

See also *Northern Pacific Ry. Co., Appellant, v. Abner Townsend*, 23 Sup. Ct. Rep. 671.

Railroad Co. v. Howard, 7 Wall. 392.

Central of Georgia Ry. v. Paul, 93 Fed. 878.

Hill v. Gruell, 42 Ill. App. 411.

United Water Works Co. v. Omaha Water Co., 164 N. Y. 41.

In the Northern Pacific case the Court held that it was not possible for the Railway Company to alienate its property, or to have its property taken by adverse possession, so as to relieve it of its obligations to the public.

V.

If there are any illegal clauses in the tripartite agreement of the Saunders deed, they are separate and distinct from the sixth clause under which we claim, and may therefore be disregarded without affecting the validity of the instrument.

Void clauses do not invalidate whole deed.

Appellant claims that the tripartite agreement contains two illegal agreements, and that they are so intermingled with the sixth subdivision of the agreement as to make the entire instrument void.

The provision of the second clause of the agreement that the eastern terminus of the Union Pacific Railroad shall be and remain in the City of Omaha is probably, so far as it counteracts the provision of Congress that the eastern terminus shall be in Council Bluffs, of no effect. It is not tainted with any immorality such as instruments in violation of the criminal law so as to affect the rest of the instrument. It is simply of no effect and cannot be enforced. Counsel also claims that the third subdivision contains some conditions also in contravention of the Act of Congress because they amount in

substance to the same as the second. We do not see that such is the case, but it is entirely immaterial in this case. The sixth subdivision requires the Union Pacific Railroad Company to allow the trains of all other roads now or hereafter running into or out of Omaha and Council Bluffs, the unobstructed access and transit to and over said bridge and its approaches with their trains, engines and cars.

The question of the location of the eastern terminus of the Union Pacific Railroad bears no relation to this obligation. The obligation to maintain the eastern terminus of the railroad at Omaha is one thing; the obligation to allow the trains of any railroad running into or out of Omaha and Council Bluffs to have unobstructed access and transit to and over said bridge and approaches is a totally distinct thing.

By this clause the people of Omaha undertook to secure by said bridge, its approaches and the depots and tracks connected therewith "the more perfect connection of any railroads that are or shall be constructed to the Missouri River at or near Council Bluffs, Iowa, and Omaha, Nebraska," as recited in the first recital of the contract. Take plaintiff Company, a railroad constructed to Council Bluffs and desiring to connect with lines built to a point near Omaha, Nebraska; this clause in the contract was

made to cover such a case. Now, it makes no difference to this Company whether the eastern terminus is Council Bluffs or Omaha. If the clause requiring the eastern terminus of the Union Pacific Road to be in Omaha is void, then there is all the more reason why the other should be enforced, so that part at least of the objects to be attained by the gift of $450,000 bonds shall be accomplished.

We may concede for the purpose of this argument that the provisions of sections two and three of this contract are void. We would then come within those cases which hold that where for a legal consideration a party undertakes to perform two acts, one of them lawful and the other unlawful, the contract is good for so much as is lawful and void for the rest of it.

McCullough v. Virginia, 172 U. S. p. 115.
Gelpecke v. Dubuque, 1 Wallace, 175.
United States v. Bradley, 10 Pet. 343.
W. U. Telegraph Co. v. B. & S. W. Ry. Co., 3 McCrary, 136.
Oregon S. N. Co. v. Winsor, 20 Wallace, 65.

The rule of law stated by us is so thoroughly settled that it is not open to any serious question. One of the earliest cases upon this subject is the case of the *United States v. Bradley*, in which the opinion

U. S. v. Bradley.

was written by Mr. Justice Story. It was a suit brought upon a bond given to the United States by Hall, who was appointed paymaster of the Rifle Regiment in the army of the United States. It was held that as to some of the conditions of this bond they were without authority of law and void, but as to other conditions they were valid, and that, the valid stipulations being separable from the void stipulations, the bond was good as to those stipulations not in violation of law. The opinion is a careful consideration of the subject and has been accepted from that day to this as an indisputable authority upon this question. Mr. Justice Story said:

> "That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. Thus, in Pigot's case, 11 Co. Lit. 27b., it was said that it was unanimously agreed in 14 Hen. VIII. 25, 26, that if some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some are good and lawful, that in this case the covenants or con-

ditions which are against law are void *ab initio*, and the others stand good."

It was contended that this doctrine was not applicable to cases where the illegality arises under a statute, but the Court held that it made no difference whether the bond was partially void by reason of the prohibition of some statute, not *malum in se* or void for the want of authority at common law; that in either case, the conditions and covenants being separable, the bond was only void as to those conditions inhibited by statute. In this case the bond was one instrument containing covenants authorized by law, and others not authorized by law. On this subject Mr. Justice Story said:

> "Upon the whole, upon this point we are of opinion that there is no solid distinction in cases of this sort between bonds, and other deeds containing conditions, covenants, or grants, not *malum in se*, but illegal at the common law, and those containing conditions, covenants, or grants illegal by the express prohibitions of statutes. In each case the bonds or other deeds are void as to such conditions, covenants, or grants which are illegal and are good as to all others which are legal and unexceptionable in their purport. The only ex-

ception is when the statute has not confined its prohibitions to the illegal conditions, covenants, or grants, but has expressly, or by necessary implication, avoided the whole instrument to all intents and purposes."

Oregon Steam Navigation Co. v. Winsor.

The subject again came before the Court in the case of *Oregon Steam Navigation Co. v. Winsor*, 20 Wallace, p. 64. This case is directly in point. In that case it appeared that the Oregon Steam Navigation Co. sued Winsor for damages by reason of the violation of a stipulation not to run a certain steamer in the waters of the Columbia River and its tributaries. The facts were as follows:

The California Steam Navigation Co. in 1864 was engaged in transportation in the California waters. It sold a steamer to the Oregon Steam Navigation Co., engaged in like business on the Columbia River and its branches. There was a covenant that for ten years from May 1, 1864, the Oregon Co. should not run this boat in the rivers and bays of the waters of California. Thereafter the Oregon Co. sold to the defendant Winsor, and Winsor agreed that for ten years from February 18, 1867, he would not run the boat in any of the waters of California or the waters of Columbia River and its branches. Now the Court held that such an agreement was valid

only as to local waters where the boat would be in competition with the grantor's business; in other words, that such an agreement, although in restraint of trade, was not unreasonable when applied to the local community where the grantor was doing business; but when the Oregon Co. sold out to Winsor, he agreed for ten years from 1867 not to run the boat in either the California or the Columbia River waters. As to the three years after the first contract had expired, not to run the boat in California waters, the contract was absolutely void, as in restraint of trade. One of the stipulations of the contract being in restraint of trade, it was claimed the whole contract was thereby made void. This is directly in point in the case at bar. Mr. Justice Bradley, who wrote the opinion, quoted with approval the language laid down by Chitty, as follows:

> "That agreements in restraint of trade, whether under seal or not, are divisible; and accordingly it has been held that when such an agreement contains such a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the Court will give effect to the latter, and will not hold the agreement to be void altogether."

This case was approved in the case of *McCullough v. Virginia*, 172 U. S. 102, opinion by Justice Brewer. In that case it appeared that certain bonds were issued by Virginia, and a contract made to receive the coupons in payment of all taxes, debts, dues and demands due the State. It appeared that as to some of these taxes the agreement was illegal, but Justice Brewer held that as to other of the taxes, the agreements being legal, the contract was therefore divisible, and came within those agreements where, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good as to the lawful acts which the party agrees to do, citing with approval *United States v. Bradley*, *supra*, *Gelpecke v. Dubuque*, *supra*, and other authorities.

In the case of the *Western Union Telegraph Co. v. Burlington & Southwestern Ry. Co.*, 3 McCrary, p. 130, it appeared that the Railway Company had made a contract with the Telegraph Company, whereby the companies agreed upon the erection of a telegraph line upon the Burlington system of railways, the Railway Company was to furnish the poles and labor, the Telegraph Company to furnish the wire and instruments, etc. The contract also contained a clause giving to the Telegraph Company the exclusive right

of way for the erection and operation of telegraph lines upon the Railway Company's property. This particular clause was held to be prohibited by the Act of Congress making railroads post roads; but the Court (Circuit Judge McCrary) held that the illegal consideration or covenant could be disregarded, and that the contract would be valid as to its other provisions. The same rule applies to a statute.

Noble v. Mitchell, 164 U. S. 367.
Field v. Clark, 143 U. S. 649.
Huntington v. Worthen, 120 U. S. 97.
Allen v. Louisiana, 103 U. S. 80.

Applying these principles to the case at bar, it seems to us that the position of counsel is not well taken. How can the Union Pacific Railway Company come into Court and say: "True, I made an agreement that, in consideration of having received $450,000 of bonds and real estate, I would, first, construct a bridge across the Missouri River; * * * fourth, expend a certain sum in the improvement of the passenger station and depot, and other improvements; fifth, maintain certain machine shops, permanent offices, etc.; sixth, allow any other railway company to run its trains over the bridge and its approaches without discrimination, hindrance, preference or delay; but because I also agreed to make

the Eastern terminus of the road in the City of Omaha, which agreement was rendered void by reason of the Act of Congress requiring the Eastern terminus to be in Council Bluffs, therefore all of my agreements are likewise void." We say that it does not lie in the mouth of the Union Pacific Company, or its successors, to raise this question.

VI.

Entitled to use of property without discrimination.

The complainant is entitled to the use of thi property for the same consideration the othe companies pay.

We do not think the appellant's assignments o error properly raise this question, but we submit th following suggestions:

The covenant in the tripartite agreement co tained in the Saunders deed provides that any oth railroad company shall have the right to use the sa bridge property without discrimination, hindranc preference or delay. This, of course, would give t complainant company the right to use the proper for the same consideration as the Milwaukee a Northwestern Companies, whose contracts we made in May, 1898. See

St. Paul Union Depot Co. v. Minnesota & W. Ry. Co., 47 Minn. 154.

Chicago, St. Paul & Kansas City Ry. v. Paul Union Depot Co., 54 Minn. 411.

State of Minnesota v. same. 42 Minn. 144.

Laws of Minnesota, 1879, Chap. 318.

In this case the St. Paul Union Depot Company was organized under the laws of Minnesota, and was granted certain additional powers by the Special Laws of 1879. It provided for the issuance of stock to various railroad companies, and, among other things, any railway company was empowered to "subscribe to the capital stock of the said St. Paul Union Depot Company, or become a stockholder thereof; and upon becoming the owner of such a number of shares of stock as shall be deemed equitable by said board of directors, and upon executing an agreement to conform to its by-laws and regulations, and to pay such charges as are required to be paid by the other railroad companies, any such company is declared to be entitled to elect or appoint one member of the board of directors." Section 4 of the Act provided:

> "There shall be no unjust discrimination against or in favor of any railroad corporation or railroad company using, or desiring to use, the said road, tracks, and union depot of the said St. Paul Union Depot Company, but the terms, conditions and regulations adopted for the same shall be, as far as practicable, uniform, and apply alike to all railroads using, or desiring to use, the said road, tracks, and

Union Depot of the said St. Paul Union Depot Company."

All the other companies were allowed to subscribe for the stock at par. Some years after this the Minnesota & Northwestern Railroad Company (now the Chicago Great Western Railway Company) applied to the Union Depot Company to purchase its quota of stock at par; the Board of Directors refused to allow it to purchase stock at par, claiming that the stock had enhanced in value and was worth $342.86 per share. The Supreme Court of the State of Minnesota said that it was entitled to use the depot without discrimination, and to subscribe for the stock by paying the same consideration as the other companies paid. This is an exceedingly strong case. The opinion was written by Mr. Justice Dickinson, one of the leading Judges of the State, and is so applicable to the case at bar that we invite the Court's attention to the same.

How can the complainant be allowed to use the property without discrimination or preference, if one price is charged it for the use of the identical property, and a much lower price is charged its competitors, the Rock Island, the Milwaukee, the Burlington, and the Northwestern Companies, competing lines between Chicago and Omaha for the

business which the Mason City & Fort Dodge Railroad Company seeks to do? Allowing it to use the property for one price, and charging its competitors a less price, is a direct discrimination and preference not allowed by the terms and conditions of the tripartite agreement. But in the absence of any testimony to the contrary, the contracts made by the defendant company in May, 1898, for 999 years for the use of this same property, is the very best evidence that it is a reasonable consideration.

But we think a reasonable interpretation of the Pacific Railroad Acts requires that company to allow the complainant to use the bridge and tracks for the same compensation as the other companies. It was not claimed in the court below that the compensation was not reasonable. This compensation has been fixed in every contract made by the present company and by the Second Pacific Company. We believe that the contracts made under like circumstances with the other roads for the use of this property are the best evidence of its reasonableness. Furthermore, the Union Pacific Railroad Company is a public carrier. It is required to connect with all the other lines of road reaching the Missouri River at Council Bluffs. In the carriage and transportation of all passengers and freight it would be compelled to give equal rates.

The Supreme Court of the United States in the Rock Island case held that the laws of 1871 and 1866 simply regulated the use of the Union Pacific road for a reasonable compensation. If the Union Pacific Company was to haul a carload of freight for the complainant, it would be obliged to haul it for the same rate it charges other shippers. Is it not the reasonable interpretation of these Pacific Acts that it must permit this user for equal compensation? Would not any other compensation be unreasonable? In fact, evidence that would establish the reasonableness of the rates as to one company would establish it as to all companies. In view of the state of the evidence in this case, there was no error in the decree of the court below permitting the use of this property by the complainant on the same terms as the other companies.

VII.

The Mason City Company had ample authority under its charter and Articles of Incorporation to extend its line into the State of Nebraska.

It is urged by the appellant that the articles of incorporation of the Mason City Company do not authorize it to extend its road into the State of Nebraska. This question was not raised in the Circuit Court, but was raised in the Circuit Court of Appeals, and the opinion of that Court is found on pages 291 & 292, Vol. 3, of the Record. That opinion seems to be so conclusive as to require little support by argument and authority.

Under the laws of the State of Iowa, it is not necessary to specify the route of the line of railroad to be constructed. Railroads are organized under the General Statutes, Sections 1609 & 1610, Statutes of 1897. The articles of incorporation of the Mason City Company provide that:

> "the object of said corporation is to construct, maintain, and operate a railroad from Mason City, in the County of Cerro Gordo, to Fort

Dodge, in the County of Webster, in said State, thence to Lehigh, in said County of Webster, and thence to a point on its line at or near said Lehigh in a southwesterly direction to the City of Council Bluffs, in the County of Pottawattamie, in said State of Iowa, **with such lateral branches from any point on its said line, and such extensions beyond each and every of said points, as the Board of Directors of said corporation may determine upon and designate and the law permit.*"—Record, Vol. 1, pages 163 and 164.

The Statute of Iowa specially authorizes this Company to extend its line into Nebraska. Section 2038 of the Statutes of 1897 is as follows:

"§ 2038. *Extensions.* Any such corporation, organized for the purpose of constructing a railway from a point within the state, may construct or extend the same into or through another state, under such regulations as may be prescribed by the laws of such state and its rights and privileges over said extension in the construction and use thereof, and in controling and applying the assets shall be the same as if its railway was constructed wholly within the state."

*Italics are ours.

The Board of Directors of the Mason City Company duly passed a resolution accepting the terms of the Act of the Legislature of the State of Nebraska entitled "An Act to enable foreign corporations to become domestic corporations of this state," and, pursuant to said Act, filed its articles of incorporation in the State of Nebraska and paid the fees therefor—Record, Vol. 1, pages 150 to 167. It thereby acquired the right to hold and use any interest in property in the State of Nebraska which the laws of Iowa and its articles of incorporation authorized it to acquire.

The Board of Directors of the complainant company, on the 28th day of October, 1902, passed a resolution authorizing its officers to enter into a contract with the Union Pacific Company for the use of the property governed by the decree in this case, and to demand the use thereof, and to enforce said demands by suits against the Union Pacific Company, as might be necessary.—Record, Vol. 1, pages 517 to 520.

It will thus be seen that under the Statutes of Iowa, the Mason City Company was authorized to build or extend its line into or through any other state, under such regulations as may be prescribed by the laws thereof; and its rights and privileges over said extension are the same as if its railroad was

constructed wholly within the state. In other words, if permitted by the laws of Nebraska, it was to have the same rights on any extension that it would have under the laws of Iowa. By adopting the provisions of the Nebraska Statute and filing its articles of incorporation, it complied with the regulations of that state, which enabled it to build or extend its line into Nebraska and to acquire and to hold all necessary property to enable it to operate a railroad in and through that state. The articles of incorporation authorized the Mason City Company to make such extension beyond each and every of said points on its designated line as its Board of Directors should determine. Its Board of Directors, by the resolution of October 22, 1902, did specifically authorize the Mason City Company to demand, and to enforce its demand, for the use of the transportation facilities of the Union Pacific Company between Council Bluffs and South Omaha. This, as the court held below, was a complete compliance with this provision of its articles of incorporation. So that, under the Statutes of Iowa and Nebraska, and under its articles of incorporation, the Mason City Company had ample power to extend its line into Nebraska, by virtue of this arrangement, and to operate its road to South Omaha.

VIII.

It was urged in the court below and probably will be here, that the decree should be reversed because the evidence discloses no necessity for the Mason City Company to use the transportation facilities of the Union Pacific Company, as there is another bridge which it can procure the use of.

Omaha Bridge & Terminal Co.'s bridge and facilities.

Whether there is or not seems to us immaterial. If the Act of Congress and the tripartite agreement created an obligation upon the Union Pacific Company to allow any other railroad company to run its trains over the bridge and tracks, it is immaterial whether it is possible for that company to procure some other line.

It is possible to build a bridge.

It is possible to condemn property in the heart of the City, and to tunnel the big hills around Omaha, and thus reach South Omaha; but, it is to obviate this enormous and ruinous expense and public inconvenience that Congress created this right and that the people of Omaha insisted upon the tripartite agreement.

But it is not true that the Mason City Company

can contract with another company for the use of bridge and terminals. It is true that Mr. Samuel C. Stickney, the General Manager of the Mason City Company, prior to the construction of its line, entered into negotiations with the Omaha Bridge & Terminal Company, but investigation showed the impracticability of the Terminal Company's line and, as soon as Mr. Burt made a proposition for the use of the Union Pacific terminal facilities, these negotiations with the Terminal Company were abandoned and the Mason City Company's line was constructed to connect with the Union Pacific route as shown on complainant's Exhibit 4a. Testimony of Samuel C. Stickney, Record, Vol. 1, pages 359 to 374; A. B. Stickney, 376, 392, 393, and 398 to 402.

After the negotiations with the Terminal Company were dropped, that Company's line and bridge was acquired by the Illinois Central Railroad, and it is not difficult to see that, if we rely upon the good graces of Mr. Harriman for a contract, none could now be entered into with that Company. There is absolutely no testimony that the Mason City Company could procure any such rights over the Terminal Company's bridge and tracks.

Furthermore, that Company has no passenger facilities in Omaha, and the Illinois Central Railroad

(which owns that Company) uses the Union Pacific tracks and depot. Stickney's testimony, Record, Vol. 1, pages 392 & 393.

Neither does that Company's tracks reach the stockyards at South Omaha, but it has a short-time arrangement, running fourteen or fifteen years, for trackage over the Missouri Pacific Company's line.

Furthermore, that Company's line crosses the river some three miles north of the Union Pacific bridge, far from the center of the City, then it follows in a northwesterly direction up a very steep grade onto the bluffs at a point about four miles due north of the Union Pacific bridge and there connects with a line known as the Belt Railroad Line, which follows around into another valley running nearly north and south, which reaches around to the stockyards, making a line about thirteen miles around the City of Omaha that the Union Pacific makes in about six miles. Testimony of Stickney, page 391 of Record. Such an arrangement would be of no value to the Mason City Company and of little value to the people of Omaha.

We have already shown that it is not practical for another road to construct another bridge and tracks through the City of Omaha; that the Union Pacific line with its depots runs through the very

heart of the City of Omaha, lined on each side by large business blocks and dwellings, or it runs through a narrow ravine with hills of impossible grade on each side. See photographs introduced in evidence, on file with the Clerk of this Court, Record, page 143 testimony of George W. Craig, page 121, et seq. and page 134; testimony of A. B. Stickney, 388.

It would appear, therefore, that the equities of the complainant are exceedingly strong.

FRANK B. KELLOGG,
JAMES M. WOOLWORTH,
WILLIAM D. McHUGH,
CORDENIO A. SEVERANCE,
Solicitors and counsellors for complainant and appellee.

APPENDIX A.

It will be noted that by Section eleven of the Act of Congress of 1866 (page 425 of Appendix D), the bridge therein referred to is the one created by the act of Missouri passed February 5, 1864 (page 300 of this Appendix), creating the Saint Louis and Illinois Bridge Company, amended by the Act of February 20, 1865 (page 306 of this Appendix), and "confirmed in its corporate powers under an act of the Legislature of the State of Illinois, approved February sixteenth, eighteen hundred sixty-five" (page 308 of this Appendix).

Note, that the company was incorporated under the laws of Missouri; but this did not give it the right to exist as a corporation and to construct a bridge in the State of Illinois; hence this confirmatory act which is recited in Section eleven of the act of Congress, July 25, 1866.

There is some little confusion growing out of the fact that Section eleven speaks of this confirmatory act of the State of Illinois having been passed in 1864. There was no session of the Legislature in 1864, and the act was in fact passed February 16, 1865.

This act of Congress is printed in the compendium of charters, acts, etc., issued by the bridge company, and Section eleven is therein quoted as follows:

> "Sec. 11. And be it further enacted that the 'St. Louis and Illinois Bridge Company,' a corporation organized under an act of the General Assembly of the State of Missouri, approved February fifth, eighteen hundred and sixty-four, and an act amendatory of the same, approved February twentieth, eighteen hundred and sixty-five, and also confirmed in its corporate powers under an act of the legislature of the State of Illinois, *approved February sixteenth, eighteen hundred and sixty-five*, or any other bridge company organized under the laws of Missouri and Illinois, be and the same is hereby empowered to erect, maintain, and operate a bridge across the Mississippi river, between the city of St. Louis, in the State of Missouri, and the city of East St. Louis, in the State of Illinois, subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following terms and provisions contained in this act; and in case of any litigation arising from any obstruction, or al-

leged obstruction, to the free navigation of said waters, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches."

We italicize the difference between this act and the act as it appears printed in the Statutes at large. Whether there was a mistake in printing these Statutes, or not, we cannot say. The counsel, in the court below, printed this act as it appears in the compendium, to-wit: "Approved February sixteenth, eighteen hundred sixty-five."

Furthermore, this confirmatory act is published by the bridge company as a part of its charter. It is Section 3 of the act, page 310 of this Appendix, *which requires the company to allow any other railway company to run its cars, locomotives and trains over the bridge.* This is the way the law stood at the time of the passage of the act of Congress, July 25, 1866. Subsequently, the legislature of the State of Illinois passed an act, approved February 21, 1867, page 314 of this Appendix, creating the Illinois and Saint Louis Bridge Company; and, thereafter, the Illinois legislature authorized the consolidation of these bridge companies (Page 319 of this Appendix). On this consolidation, Section 3 of the confirmatory act

of the State of Illinois, of 1865, referred to in Section eleven of the act of Congress, 1866, became a part of the bridge charter, and, subjected the bridge to the right of every railroad to use the same. It appears certain, therefore, that when Congress passed this act of 1866, and provided that the bridge to be built at St. Louis should be "*subject to all of the conditions contained in the said act of incorporation and amendments thereto,*" the Congress secured the right to the use of the bridge to other railroad companies.

Feb. 5, 1864.

An Act to incorporate the St. Louis and Illinois Bridge Company.

Be it enacted by the General Assembly of the State of Missouri, as follows:—

Incorporators of St. Louis & Illinois Bridge Co.

Section 1. That Norman Cutter, Joseph Cabot, E. O. Stanard, Edward C. Pike, John H. Lightner, Hugh McKittrick, S. G. Read, Rufus Fitch, George D. Hall, John H. Beach, Chas. Miller, H. A. Doan, John H. Bowen, E. H. Sterling, James H. Wear, James R. Blackman, Clinton O. Dutcher, John H. Siegrist, Wm. D'Oench, C. Reuss, Robert Heinrichshofen, Jabob Woodburn, Chas. F. Meyer, Robert H. Ober, Chauncey I. Filley, B. R. Bonner, Charles H. Howland, and E. H. E. Jameson, and their associates

and their successors, are hereby constituted a body corporate and politic, by the name of the St. Louis and Illinois Bridge Company, for the purpose of constructing a bridge with all machinery, fixtures, toll-houses, and other buildings and erections necessary and proper for the passage of persons and property, over the Mississippi River at the city of St. Louis; and the said company, by their corporate name shall have perpetual succession, and shall be capable in law of purchasing, taking, holding, using, selling, pledging, conveying and disposing of real estate or other property, whether personal or mixed, so far as the same may be necessary for the purposes herein mentioned, may have a common seal; may sue and be sued, plead, and be impleaded, defend and be defended against, contract and be contracted with; may make such by-laws, rules and regulations, appoint such officers, agents, and servants, and generally do all such acts and things, not inconsistent with the laws and Constitution of the State of Missouri and of the United States, as may be requisite and proper for the due execution and management of the work to be done, and for conducting the business of said company.

Purpose.

Sec. 2. All powers of said corporation shall be exercised by a Board of Directors, and such officers

Board of Directors.

and agents as they may elect and appoint. Said Board shall consist of nine Directors, who shall be elected annually by a majority in interest of the stockholders present and voting in person or by proxy, at such time and place as shall be prescribed by the by-laws; and who shall hold their offices until their successors are elected and qualified. Previous to such election the corporators herein named shall constitute the Board of Directors, five of whom shall constitute a quorum to do business. They may, at any time after the passage of this act, cause books to be open for subscriptions to the capital stock of said company, at such time and place and in such manner as may be by them prescribed.

Capital stock.

Sec. 3. The capital stock of said company shall be one million of dollars, which shall be divided into ten thousand shares of one hundred dollars each; and said capital stock may be increased to four millions of dollars. When three hundred thousand dollars shall be subscribed, the corporators shall call a meeting of the stockholders, for the purpose of electing a Board of Directors, at such time and place as they may fix and appoint, of which election thirty days' notice shall be given in two daily newspapers published in the city of St. Louis.

Sec. 4. It shall be lawful for said corporation to borrow money at any rate of interest, and to mortgage the franchises and property; and to issue bonds secured by said mortgage, and to sell the same at any agreed rate of discount; and for railroad corporations, in their corporate capacity, to subscribe to the capital stock of said company.

May borrow money, issue bonds, etc.

Sec. 5. The said company shall have the same power to acquire title to lands necessary for the construction of said bridge, and for the approaches to it from public highways, and the same power to take material from lands in the neighborhood for the construction thereof, and the proceedings therein shall be conducted in the same manner, as is provided in the "Act to authorize the formation of railroad associations and to regulate the same," approved December 13, 1855; and said company shall also have the right to protect the banks of the river above and below the bridge, so far as may be necessary to keep the channel within the opening of the bridge for the passage of vessels, and for that purpose to acquire, condemn, and take lands and material in the manner aforesaid.

May acquire lands necessary, etc.

Protection of river banks.

Sec. 6. The said bridge shall be constructed of stone, iron, and wood, but mainly of iron and stone. The company shall have power to determine, and may

Specifications for construction of bridge.

determine and decide, by a vote of the majority i
interest of stockholders, what kind of a bridge sha
be built—whether suspension, tubular, draw, or oth
erwise; but, whatever kind it may be, it shall be s
constructed as not to obstruct or impede the naviga
tion of the river. If a draw-bridge shall be decide
upon, it shall be built of sufficient capacity for a com
mon wagon way and a foot-passenger way, and may
also be built of sufficient capacity for a railroad track
or tracks for the passage of trains of freight and pas
sengers, with spans not less than two hundred feet in
length over the water, and shall have at least one
draw, with two openings not less than one hundred
feet in width each, for the passage of steamboats or
Attendance and management of bridge.
other vessels. It shall be properly attended and
managed, so as to afford safe and easy passage for all
persons and property; and every railroad train
drawn by steam power shall, on approaching said
Trains shall stop.
bridge, stop its speed and come to a stand-still on the
bank before entering upon the passage of the bridge.
[*Repealed.*]

Tolls:

SEC. 7. When said bridge is completed, the said
company shall be entitled to demand and receive tolls
for crossing the same, and to fix rates of toll, of which
a schedule shall be kept conspicuously posted at each
end of the bridge; which rates, however, shall never

exceed the following, to-wit: For each foot passenger over five years of age, 5 cents; for every person on horseback, 20 cents; for every gig, buggy, or other traveling carriage, drawn by one animal, 40 cents; for every cart or wagon drawn by one animal, 40 cents; for every cart or wagon drawn by two animals, 60 cents; for every cart or wagon drawn by three animals, 80 cents; for every cart or wagon drawn by four animals, 100 cents; for every cart or wagon drawn by more than four animals, 10 cents extra for each animal; for every pleasure carriage drawn by two animals, 60 cents; for every pleasure carriage drawn by three or four or more animals, 100 cents; for each head of cattle, horses, mules, or other animals, 10 cents; for each head of sheep or swine, 3 cents. And should said bridge be built with railroad tracks, the said company is hereby authorized to make such terms and rates with railroad companies, for the passage of trains of freight and passengers, as may be agreed upon between said St. Louis and Illinois Bridge Company, and the said railroad companies; and in case of disagreement the amount of compensation to be paid for passage over said bridge as aforesaid, shall be determined by five referees, two of them to be appointed by each of said corporations, and the fifth by the other four.

for other than railroad trains;

for railroad trains;

in case of disagreement as to compensation.

Taxation.

Sec. 8. For purposes of taxation, all property owned by this corporation shall be taken and deemed as personal property, in the shape of stock in the hands of the stockholders; and the same shall be assessed and taxed as stock only, and the stockholders shall be liable for the amount of their stock.

Inconsistent acts repealed.

Sec. 9. All acts and parts of acts, inconsistent with or repugnant to this act, are hereby repealed.

Sec. 10. This act shall be taken as a public act, and shall be in force from and after its passage.

Approved February 5th, 1864.

Feb. 20, 1865.

An Act to amend an Act entitled "An Act to incorporate the St. Louis and Illinois Bridge Company," approved February 5, 1864.

Be it enacted by the General Assembly of the State of Missouri, as follows:—

Section 6 of act of Feb. 5, 1864, repealed.

Section 1. The sixth section of said act is hereby repealed, and the following inserted in lieu thereof: "Section 6. The said bridge shall be built of such materials and upon such plans as the Board of Directors shall decide to be most suitable for the uses required of it; and it shall be of sufficient capacity to accommodate all the different kinds of travel, both common road and railroad travel, as well as foot pas-

sengers, that may require to cross upon it; and it shall be sufficiently high to admit of steamboats, and all other river crafts passing under it at all ordinary stages of the river, when the chimneys, pipes, and other projections are lowered down; and the spans of the bridge between the piers and abutments shall be sufficiently wide to admit of all river crafts being easily navigated through them; the piers shall be so constructed as to obstruct the free flow of the current as little as possible; the approaches to said bridge may pass over all wharves, streets, and other public highways, and may occupy portions of the same, in such manner as to obstruct the same as little as possible. The Board of Directors shall have power to appoint a bridge police, which shall have and exercise upon said bridge and its approaches the same powers as are exercised by the police of the city of St. Louis."

Amended specifications for construction of bridge; attendance of bridge.

Sec. 2. That the following words are and they are hereby added to the fourth section of said act, viz.: "And the city of St. Louis may subscribe for any amount of said stock not to exceed one million of dollars, and the county of St. Louis may subscribe for any amount of said stock not to exceed half a million of dollars, and they may borrow money for that purpose, and may issue bonds for the payment of the

St. Louis may subscribe for stock.

same, which bonds shall be made payable twent years after date, and shall bear interest at a rate no greater than seven per cent per annum.

Substitution of names of incorporators.

Sec. 3. Section first of said act is amended as fol lows: "Strike out the names of Charles Miller, E. G Sterling, James H. Wear, S. G. Read, and John H Siegrist, and insert in lieu thereof, Truman J. Homer Carlos S. Greely, J. D. Barlow, E. W. Fox, and John M. Krum."

Inconsistent acts repealed.

Sec. 4. All acts or parts of acts inconsistent with this act are hereby repealed. This act is to take effect and be in force from and after its passage.

Approved February 20th, 1865.

Feb. 16, 1865.

An Act to empower the Persons mentioned in an Act of Incorporation passed by the General Assembly of the State of Missouri, entitled "An Act to Incorporate the St. Louis and Illinois Bridge Company," approved February 5, 1864, to form a Corporation and build a Bridge across the Mississippi River at St. Louis.

Be it enacted by the people of the State of Illinois, represented in the General Assembly:—

May incorporate, construct, etc.

Section 1. That the persons named in the act of incorporation granted by the General Assembly of

the State of Missouri, entitled "An act to incorporate the St. Louis and Illinois Bridge Company," approved February 5, 1864, shall have the right to organize and form a corporation, in accordance with said act, to construct, maintain, and use a bridge, for railroad and other purposes, over that portion of the Mississippi River at the city of St. Louis, within the jurisdiction of the State of Illinois, subject to the conditions, terms, and modifications herein set forth; *provided*, that said bridge shall not be located more than one hundred feet north or south of the dyke or causeway upon which the ordinary travel is now conducted, and which connects Bloody Island, opposite the city of St. Louis aforesaid, with the main Illinois shore.

Location of the bridge.

Sec. 2. Whenever three hundred thousand dollars shall be subscribed, the said persons named in the first section of said act passed by the General Assembly of the State of Missouri, or any five of them, shall call a meeting of the stockholders; and a majority in interest of said stockholders, in accordance with said act, shall elect nine Directors, who shall fix and determine the location of said bridge; and thirty days' notice shall be given of the time and place of such election in two daily papers published in said city of St. Louis, and in one daily or weekly news-

Directors.

paper published respectively in the counties of St. Clair and Madison, in the State of Illinois.

Railroads which now or may hereafter terminate, etc., may cross the bridge.

Sec. 3. Should said bridge be built with railroad tracks, the said company shall suffer and permit the railroad companies whose *termini* are now on Bloody Island, opposite the city of St. Louis aforesaid, or which may hereafter terminate there, to cross upon said bridge with their cars, locomotives, and trains, upon such terms and rates as may be agreed upon between the St. Louis and Illinois Bridge Company and the said railroad companies; and in case of disagreement as to the amount of compensation to be paid for passage as aforesaid, the same shall be determined by five referees, two of whom shall be appointed by each of said corporations, and the fifth shall be appointed by the four referees; and in case said companies can not agree as to said referees, or if either party shall fail or refuse to make such appointment, either party may apply to the Judge of the St. Clair County Circuit Court, upon giving to the opposite party ten days' notice in writing of such intended application, for the appointment of five referees to fix said compensation, and he shall have full powers to make such appointment for the party refusing to appoint referees as hereinbefore provided; and the said referees so appointed shall have power

In case of disagreement as to compensation.

to fix and determine said compensation, and shall furnish a copy of their award to each of the parties; and either party may appeal from such decision to the St. Clair County Circuit Court of the State of Illinois, according to the laws regulating appeals from justices of the peace and may also appeal to the Supreme Court, under the laws of the State of Illinois, *provided*, that any such appeal shall not affect the right of any railroad company to pass over said bridge during the pendency of such appeal, if the compensation fixed by said referees shall be duly tendered; *and provided further*, [that] in case said St. Louis and Illinois Bridge Company hinder or prevent any such railroad company from the use of said bridge upon tender of the compensation fixed as aforesaid, the said St. Louis and Illinois Bridge Company shall forfeit all rights and privileges under this charter.

Disagreement shall not affect right of railroad to pass over, during pendency, etc.

Sec. 4. *And be it further enacted*, that any railroad company whose terminus is now on Bloody Island aforesaid shall have power of becoming incorporated in said bridge company, and to take and subscribe, or acquire by subsequent purchase, stock not to exceed one-sixth part of the capital stock of said Bridge Company which may be created from time to time, either by subscription or purchase;

Railroad companies terminating at Bloody Island may acquire stock.

whenever such railroad company shall, by an order of its Board of Directors, make an order to that effect, and subscribe and secure to be paid the amount necessary, it shall be deemed in law an incorporator in said company hereby chartered to such an extent, and shall have and enjoy all the rights belonging or appertaining thereto.

May acquire lands for construction, and approaches.

Sec. 5. The said company shall have power to acquire title to all lands necessary for the construction of said bridge, and for the approaches thereto from railroad and highways; and the said company shall also have the right to protect the banks of the river above and below the bridge, so far as may be necessary to keep the channel within the opening of the bridge.

May condemn lands necessary, etc.

Sec. 6. The said company shall have power to condemn, under the laws of the State of Illinois, all such lands and other property as may be necessary for the construction of said bridge and the approaches thereto from railroads and other public highways, and also all such lands and property as

Protect river banks.

may be necessary and proper to protect the banks of said river above and below said bridge; *provided always*, that no lands shall be condemned for bridge purposes or other purposes, before mentioned, which have already been condemned or acquired for the use

of any railroad terminating on Bloody Island aforesaid.

May borrow money, issue bonds, etc.

Sec. 7. Said corporation may borrow money at any rate of interest, and may mortgage their franchises and property and issue bonds secured by said mortgage, and sell the same at any agreed rate of discount.

Shall not discriminate in fixing toll rates.

Sec. 8. The said company shall not make any discrimination or exercise any partiality in fixing the rates for carrying persons or freight or trains over said bridge, but the same shall be just, equal, and uniform, as to all persons and corporations; and in case of violations of this section the person or corporation aggrieved shall have the right to recover from the company three times the amount so improperly charged, before a justice of the peace where the amount is under one hundred dollars, and in the Circuit Court when the amount is over that sum.

Stockholders' liability.

Sec. 9. The stock of this company shall be deemed as personal property, and the stockholders shall only be liable to the creditors of said company to an amount equal to the amount of stock held by them respectively.

Sec. 10. This act shall be deemed and taken as a public act, and be in force from and after its passage.

Approved February 16, 1865.

Feb. 21, 1867.

An Act to Incorporate the Illinois and St. Louis Bridge Company.

Be it enacted by the people of the State of Illinois, represented in the General Assembly:—

Incorporators of Illinois & St. Louis Bridge Co.

Section 1. That Joseph Gillespie, John M. Palmer, Jesse K. Dubois, William Shepard, John Williams, William R. Morrison, L. A. Parks, Levi Davis, T. B. Blackstone, H. C. Moore, Peter H. Willard, R. P. Tansey, Gustavus A. Koerner, C. P. Heaton, L. B. Boomer, Fred. T. Krafft, L. B. Parsons, John Baker, A. H. Lee, and their associates, successors, and assigns, be and are hereby created a body corporate and politic, under the name and style of the

Purpose.

Illinois and St. Louis Bridge Company, for the purpose of constructing and maintaining a toll-bridge, from any point or place on the Mississippi River opposite to the city of St. Louis, to the western line of this State, with suitable approaches to such bridge, and all convenient appendages and structures for the same.

The said Company shall have the power to make and use a common seal, and the same to alter and renew at pleasure, and such other powers, rights, privileges and immunities as may be necessary or useful for the purpose of this act; *provided*, that

there shall be at least fifty thousand dollars expended during the year 1867 in the construction of said bridge.

Capital stock.

Sec. 2. The capital stock of said Company shall be one million dollars, and be divided into shares of one hundred dollars each; and may be increased from time to time, as a majority of the stockholders may direct, and shall be issued and transferred in such manner, and under such conditions as the Directors of said Company shall, by the by-laws thereof, prescribe.

Board of Directors.

Sec. 3. The corporate powers of said Company shall be vested in and exercised by a Board of Directors, consisting of such number of persons, not less than three nor more than thirteen, as the stockholders of said Company may from time to time direct. The said Directors shall be chosen by the stockholders at such time and place as may be fixed by the by-laws of said Company, and shall hold their offices for one year, and until their successors are elected and qualified. They shall elect one of their number President of the said Company, and may fill any vacancy in the said board, occasioned by death, resignation, or otherwise, for the unexpired portion of the term of office so becoming vacant, and may make such rules, by-laws, and regulations, and appoint

such officers and servants, as they may from time to time deem expedient; *provided*, that at least one-half of the Directors shall be residents of the State of Illinois.

Stock subscription books.

Sec. 4. The persons named in the first section of this act are hereby appointed Commissioners, who, or a majority of them, are authorized to open, or cause to be opened, subscription books for the stock of said Company, at such time and place within or without this State as they may think proper; and when three hundred thousand dollars shall be subscribed, the said Commissioners, or any three of them, may call a meeting of the stockholders, by giving ten days' notice in some newspaper published in St. Louis, or personal notice to each of the stockholders, of the time and place of such meeting; and at the same the stockholders may elect Directors and transact other business. Stockholders' meetings may be held without as well as within the State.

May transport over bridge or allow others to.

Sec. 5. The said corporation may transport on said bridge and approaches thereto persons and property by steam or otherwise, and may allow others so to do; and said bridge and approaches may be used for every description of travel, passage, and transportation, under such rules and regulations, and for such tolls as the Directors of the said corporation

may prescribe. The said corporation may take, receive, and collect such tolls for travel, passage, or transportation over said bridge and approaches, or either of them, or any part of either of them, as its Directors may from time to time fix and establish; *provided*, the rates charged for ordinary travel shall never exceed the following, to wit: for each foot passenger over five years of age, five cents; for every person on horseback, twenty cents; for every gig, buggy, or other traveling carriage, drawn by one animal, forty cents; for every cart or wagon drawn by one animal, forty cents; for every cart or wagon drawn by two animals, sixty cents; for every cart or wagon drawn by three animals, eighty cents; for every cart or wagon drawn by four animals, one hundred cents; for every cart or wagon drawn by more than four animals, ten cents extra for each animal; for every hundred pounds of freight over two thousand pounds, five cents; for every pleasure carriage drawn by two animals, sixty cents; for every pleasure carriage drawn by three or four or more animals, one hundred cents; for each head of cattle, horses, mules, or other animals, ten cents; for each head of sheep or swine, five cents.

Toll rates.

Sec. 6. The said corporation shall have power to acquire title to lands necessary for the construction

May acquire lands necessary, etc.

of said bridge and approaches, and the same power to take materials from lands in the vicinity for the construction and maintenance thereof; and for such purposes shall have and may exercise all the powers conferred by any of the laws of this State for acquiring right of way for railroads, public roads, or other public uses, under which the said corporation may take and acquire property, heretofore taken or acquired for such uses, as well as other property.

Exclusive right for 25 years.

The said corporation shall have the exclusive right for twenty-five years of constructing a bridge, opposite to the said city of St. Louis (in the county of St. Clair), over so much of said river as is within the jurisdiction of this State, and shall also have the right to protect the banks of the same so far as may be necessary to keep the channel within the opening of the bridge, and for that purpose may take and acquire lands and materials in the manner aforesaid; *provided*, if the bridge herein authorized is not commenced in two years, and completed in five years, this act shall be null and void.

Railroad companies, cities, etc., may purchase stock.

Sec. 7. Any railroad company, town, city, or county, shall have power to take and subscribe for and to purchase and hold stock of said Company, and may make such contracts and execute such securities or other instruments as said railroad companies,

towns, cities, or counties, may deem expedient relative to such subscription or purchase, or to the construction or uses of said bridge.

May consolidate with Missouri company.

Sec. 8. The said corporation may consolidate its property and franchise with the property and franchises of any bridge company authorized by the laws of Missouri to construct a bridge, so as to connect with the one herein authorized, and for that purpose the said corporation may make and execute all such agreements as it may deem expedient; and after such consolidation, the corporation created thereby shall have all the power herein granted.

May borrow money, issue bonds, etc.

Sec. 9. The said corporation may borrow money at any rate of interest, and issue its bonds or other evidences of its indebtedness bearing such rate of interest, and payable at such time or times, and at such place or places, as its Directors may think proper; and may secure such bonds or other indebtedness by mortgage or deed of trust of the property, tolls, and franchises in such manner as said Directors may think fit, and may sell such bonds or other evidences of indebtedness at any rate of discount agreed upon by said Directors.

Sec. 10. This act shall be deemed a public one, and shall take effect from and after its passage.

Approved February 21st, 1867.

March 19, 1868.

An Act to authorize the consolidation of the St. Louis and Illinois Bridge Company with the Illinois and St. Louis Bridge Company.

Preamble.

Whereas, The stockholders of the St. Louis and Illinois Bridge Company, a corporation organized under an act of the General Assembly of the State of Missouri, entitled, "An Act to incorporate the St. Louis and Illinois Bridge Company," approved February 5, 1864, and an act amendatory thereto entitled, "An act to amend an act entitled, 'An Act to incorporate the St. Louis and Illinois Bridge Company,'" approved February 5, 1864, which last act was approved February 20, 1865, and the stockholders of the Illinois and St. Louis Bridge Company, a corporation organized under an act of the General Assembly of the State of Illinois, entitled, "An act to incorporate the Illinois and St. Louis Bridge Company," approved February 21, 1867, have agreed to consolidate and amalgamate the said corporations; therefore,

Be it enacted by the General Assembly of the State of Missouri, as follows:—

May consolidate; name to be Illinois & St. Louis Bridge Co.

Section 1. The said St. Louis and Illinois Bridge Company is hereby authorized to form such consolidation with the said Illinois and St. Louis Bridge Company in such manner and upon such terms as the

said St. Louis and Illinois Bridge Company shall deem proper; and, when so consolidated, to take the corporate name of and be known as the Illinois and St. Louis Bridge Company.

Powers and privileges.

Sec. 2. When said consolidation shall be effected the said consolidated company shall thereby and thenceforth be clothed with all the powers and privileges granted to the said St. Louis and Illinois Bridge Company by the acts before mentioned.

Recording.

Sec. 3. When said consolidation shall be effected, the secretary of the said consolidated company shall file in the office of the Recorder of Deeds of the county of St. Louis, a certificate that the said companies have effected the consolidation authorized by the act, which certificate, or record thereof, shall be taken in all courts as conclusive proof of such consolidation.

Sec. 4. This act shall take effect from and after its passage.

Approved March 19, 1868.

March 24, 1873.

An Act to authorize the Consolidation of Bridge Companies, organized under the Laws of this State with similar Companies organized under the Laws of an adjoining State.

Be it enacted by the General Assembly of the State of Missouri, as follows:—

Authorizing consolidation.

Section 1. Any corporation or company now existing under general or special laws, or which may hereafter be created, whose object and business are the construction of a railway or a highway bridge, or both, over and across any river, the middle of the main channel of which at the point at which it is proposed to construct such bridge, is the boundary line between this State and some adjoining State, may unite and consolidate with a similar corporation or company organized in accordance with the laws of such adjoining State for the object and purpose of constructing a similar bridge at the same point, and the two companies form one consolidated company holding and enjoying all the rights, privileges, powers, franchises, and property belonging to each; and under such corporate name as they may adopt or agree upon such consolidation, shall be made by agreement in writing by or under the authority of the Board of Directors and the assent of the owners

of at least three-fourths of the capital stock of each of said corporations or companies, and a certificate of the fact of such consolidation with the name of the consolidated company, shall be filed and recorded in the office of Secretary of State; *provided*, that no such consolidation shall in any manner affect or impair the rights of any creditor of either of said companies or corporations; *and provided further*, that companies or corporations so consolidating, shall accept the provisions of this act. Such agreement may provide for the number of Directors of any such consolidated corporation not exceeding thirteen, provided that nothing herein contained shall be construed as a relinquishment by this State of the right to legislate relative to such consolidated company so far as the territory or interest of this State may be affected thereby at any time, or to exempt such consolidated company from being amenable to the laws of this State.

Sec. 2. This act shall take effect and be in force from and after its passage.

Approved March 24, 1873.

July 1, 1872.

An Act in Relation to Bridges across Rivers on the Borders of this State. Approved March 19, 1872. In force July 1, 1872.

Be it enacted by the people of the State of Illinois, represented by the General Assembly:—

Each and every corporation created by the laws of this State prior to the adoption of the new constitution, for the purpose of building bridges across the Mississippi River or other navigable streams on the borders of this State, and which shall have commenced, but shall have failed to complete the construction of its bridge within the time limited in its charter, is hereby allowed and is invested with full power and authority to proceed in the construction of its said bridge and complete the same, anything in its charter to the contrary notwithstanding.

Time limit extended in which to construct bridge.

Provided, however, that the same shall be constructed and completed within ten years from and after the passage of this act. *And provided further*, that such corporation shall have been organized and been in operation within 10 days from the time the new constitution took effect.

Approved March 19th, 1872. In force, July 1st, 1872.

APPENDIX B.

List of United States Statutes granting the right to construct Bridges across Navigable Waters, containing Clauses requiring their use by all Railway Companies, passed between 1866 and the present time.

A careful perusal of these statutes, from the time franchises were first granted for the erection of bridges over large, navigable streams for the purpose of railway travel, shows a general public policy to require that all such bridges shall be subject to the use of any railway companies which may desire to run their trains over the same for the purpose of making connections between railroads reaching the opposite side of said rivers.

We shall not in this appendix quote the language in all the said statutes; they vary, but accomplish the same object. We will, however, quote the language of a few, granted between 1866 and 1882.

The first act is that of July 25, 1866. By it a railway corporation is authorized to build a bridge over the Mississippi River at Quincy, Ill., over which

railway tracks were to be laid "for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed **all trains of all roads terminating at said river at or opposite said point shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge.**" In this same act and subject to the above limitation, franchises for bridges were granted to railway corporations to bridge the Mississippi at Hannibal, Mo., at St. Louis, Mo., at Keokuk, Ia., at Dubuque, Ia., at Prairie due Chien, Wis., at Winona, Minn., and to bridge the Missouri at Kansas City, Mo. (14 St. 244.)

On February 21, 1868, an Act was approved authorizing a railroad corporation to cross the Mississippi by constructing a bridge at La Crosse, Wis., subject to the conditions of the Act of July 25, 1866. Its language is that the railroad company "is hereby authorized to construct and operate a railroad bridge * * * subject to all the terms, conditions, restrictions and requirements and entitled to all the privileges named in an Act approved July 25, 1866, entitled "An Act to authorize the construction of certain bridges, and to establish them as post roads." (15 St. 37.)

On the 20th of July of the same year the Kansas & Missouri River Bridge Company was authorized to build a bridge across the Missouri upon or near the military reservation of Fort Leavenworth, and providing "that when constructed all roads terminating at the Missouri River, at or near the location of said bridge, shall be allowed to cross said bridge for a reasonable compensation to be paid to the owners thereof." And by the same Act the St. Joseph & Kansas City Railroad Company was authorized to build a bridge over the same river at St. Joseph, with all the rights and privileges and subject to all the restrictions, limitations and conditions contained in the Act relating to the Kansas & Missouri Bridge Company. (15 St. 121.)

On the same day another Act was passed authorizing the St. Louis & Illinois Bridge Company to construct a bridge in conformity with the Act of 1866. (15 St. 123.)

On July 27, 1868, a railway corporation was authorized to bridge the Potomac at Georgetown. It was especially provided in this Act that no one railway should have the exclusive right to operate and run trains across said bridge, but that any privilege granted to one corporation should be extended to all

who make application for such privilege, on equal terms. (15 St. 231.)

On the 30th of June, 1870, an Act was passed authorizing the construction of a bridge across the Niagara with this provision: "And all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same and in the use of the machinery and fixtures thereof, and of all the approaches thereto." (16 Stat. 173.)

On July 14, 1870, a railway company was authorized to build a bridge across the Missouri River at or near St. Joseph, Mo., subject to the limitations of the Act of July 25, 1866. (16 St. 275.)

On the 1st of July of that year, the Citizens' Bridge Company was authorized to build a bridge across the Arkansas, at Little Rock, with this provision, "All trains of all roads terminating at the Arkansas River at or near the location of said bridge shall be allowed to cross the bridge for a reasonable compensation to be paid to the owners thereof." (16 St. 185.)

On the 3rd of March, 1871, a bridge was authorized over the Mississippi, at the City of Louisiana, in which it was provided that all Railway Companies desiring to use the said bridge shall have and be en-

titled to equal rights and privileges in the passage of the same. This same act also authorized a bridge at Glasgow, Mo., over the Missouri River, subject to the same provisions of the Act. (16 St. 473.)

On the 3rd of March of the same year, a bridge across the Wabash was authorized in which it was provided "that all Railway Companies desiring to use said bridge, shall have and be entitled to equal rights and privileges in the passage of the same." (16 St. 599.)

On February 24, 1871, the Union Pacific R. R. Co. was authorized to construct a bridge across the Missouri River at Omaha, subject to the provisions of the Act of July 25, 1866. (16 St. 430.)

On March 5, 1872, the St. Joseph Bridge Building Company was authorized to cross the Missouri River at St. Joseph, Mo., and to lay on and over the bridge railway tracks for the more perfect connection of any and all railroads that are now or which may hereafter be constructed to the Missouri River at or near St. Joseph, and it was provided that all trains of all railroads might use said bridge. (17 St. 33.)

On May 1, 1872, this last Act was amended, so that the St. Joseph Bridge Building Company, *or its assigns*, might construct the said bridge, and to lay

on and over said bridge railway tracks for the more perfect connection of any and all railroads that are now or which may hereafter be constructed to the Missouri River at or near St. Joseph, and all railroads were allowed to use said bridge. (17 St. 58.)

On April 1, 1872, the Chicago, Burlington & Quincy R. R. Co. was authorized to build a bridge to cross the Mississippi River at Clinton, Ia., for the more perfect connection of any railroads that are or shall be constructed to the said river. All railroad companies were authorized to use this bridge. In this same act a bridge was authorized at Muscatine, Ia., and another to cross the Mississippi River between the Counties of Carroll and Whitesides in Illinois and the Counties of Jackson and Clinton in Iowa, subject to the provisions of this Act. A bridge was also authorized at La Crosse, Wis., to cross the Mississippi River, subject to the provisions of this Act. (17 St. 44.)

On May 11, 1872, the Boonville Railroad Bridge Company was authorized to build a bridge to cross the Missouri River at Boonville, Mo., and to lay on or over said bridge railroad tracks for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point.

All railroad companies were to have equal rights in the passage of the bridge. (17 St. 99.)

On May 17, 1872, the Western Illinois Bridge Company was authorized to bridge the Mississippi River at Quincy, Ill., over which all railway companies were to have equal rights. This same act authorized a bridge over the Mississippi River at Alexandria, Mo., subject to the provisions of the said Act. (17 St. 120.)

On May 25, 1872, any company of persons or a corporation was authorized to build a bridge across the Mississippi River at Fort Madison, Ia., over which all railway companies were to have equal rights. (17 St. 160.)

On May 31, 1872, the Little Rock Bridge Company was authorized to build a bridge across the Arkansas River at Little Rock, Arkansas, over which all trains were to have equal rights. (17 St. 193.)

On June 4, 1872, the Davenport & St. Paul Railroad Company was authorized to cross the Mississippi River at Rock Island, Ill. All other railroad companies were authorized to use this bridge. (17 St. 220.)

On June 4, 1872, a bridge was authorized to be built across the Missouri River at Nebraska City, which was to be for the use of all railroad companies,

and on the same date the Brownville, Ft. Kearney & Pacific Ry. Co. were authorized to build a bridge across the Missouri River at Brownville, Neb., over which all railroads might have passage and equal rights. (17 St. 222, 223.)

On the 10th of June, 1872, a bridge was authorized at Red Wing, Minn., over which all railway companies had equal rights. (17 St. 379.)

On February 27, 1873, the Northern Pacific Railway Company was authorized to construct a bridge across the St. Louis River at Rice's point, Minnesota, and all railroad companies were to have equal rights to use the bridge. (17 St. 477.)

On March 3, 1873, the St. Clair & Carondelet Bridge Company was authorized to construct a bridge across the Mississippi River near St. Louis, over which all railway companies were to have equal rights. (17 St. 616.)

On March 3, 1873, a bridge was authorized to cross the Missouri River at Lexington, Mo., over which all railway companies were to have equal rights. (17 St. 627.)

On the same day a bridge was authorized to cross the Ouachita River in Arkansas, over which all railway companies were to have equal rights. (17 St. 630.)

On June 6, 1874, the Milwaukee & St. Paul Railway Company was authorized to maintain a bridge at Prairie du Chien, Wis., and another at Clinton, Ia., over which all railway companies were to have equal rights. (18 St. 62.)

On June 22, 1874, the Milwaukee & St. Paul Ry. Co. was authorized to construct a bridge at La Crosse, Wis., subject to the provisions of the Act of April 1, 1872. (18 St. 197.)

On March 3, 1875, a bridge was authorized to cross the Mississippi River at Dubuque, Ia., subject to the limitations of the Act of June 6, 1874. (18 St. 522.)

On July 6, 1876, a bridge was authorized at La Crosse, subject to the provisions of the Act of June 6, 1874. (19 St. 76.)

On July 8, 1876, a bridge was authorized across the Missouri River at Nebraska City, over which all railroad companies were to have equal rights. (19 St. 76.)

On August 15, 1876, a bridge was authorized to cross the Missouri River at Sioux City, Ia., over which all railroads were to have equal rights. (19 St. 205.)

On March 13, 1878, a bridge was authorized at Glasgow, Mo., over which all railway trains were to have equal privileges. (20 St. 29.)

On July 3, 1882, the St. Louis & San Francisco Railway Company was authorized to construct a bridge across the Arkansas River at Van Buren, Ark., over which all railway trains were to have equal privileges. (22 St. 144.)

On April 26, 1882, a bridge was authorized to cross the Mississippi River at Keithsburg, Ill., over which all railways were to have equal privileges. (22 St. 50.)

On March 28, 1882, the Chippewa Valley & Superior Railway Company was authorized to build a bridge at Read's Landing, Minnesota, over which all railway companies were to have equal rights. (22 St. 34.)

On July 3, 1882, the Rock Island & Southwestern Railway Company was authorized to construct a bridge to cross the Mississippi River at New Boston, Ill., over which all railway companies were to have equal rights. (22 St. 146.)

On August 8, 1882, the Upper Iowa & Mississippi River Railway Company was authorized to build a bridge to cross the Mississippi River at Victory, Wis., over which all railway companies were to have equal privileges. (22 St. 372.)

On April 1, 1882, the Hannibal & Southwestern Railway Company was authorized to construct a bridge to cross the Missouri River at Arrow Rock, Mo., over which all trains were to have equal privileges. (22 St. 38.)

On June 27, 1882, the Sioux City and Pacific Railroad Company was authorized to build a bridge to cross the Missouri River, over which all railway companies were to have equal rights. (22 St. 112.)

On July 12, 1882, the New Orleans & N. W. R. R. Co. was authorized to construct a bridge to cross the East Pearl River, over which all railway companies were to have equal rights. (22 St. 166.)

By an Act approved August 1, 1882, a bridge was authorized to cross the St. Lawrence River, over which all trains were to have equal rights. (22 St. 390.)

On July 7, 1882, the Sault Ste. Marie Bridge Company was authorized to build a bridge across the Sault Ste. Marie River, over which all railway companies were to have equal rights. (22 St. 154.)

July 8, 1882, bridges were authorized over several rivers in the States of Florida and Georgia, over which all railways were to have equal rights. (22 St. 156.)

Other Bridge Acts containing similar clauses:

Apl. 14, 1882, At St. Charles, Mo.....22 St. 44

June 27, 1882, Over White River in Arkansas .....22 St. 109

June 12, 1884, Over Missouri in Nebraska .....23 St. 43

June 18, 1884, Over Missouri at Leavenworth, Kansas.....23 St. 50

July 5, 1884, Over Missouri at White Cloud, Kansas.....23 St. 113

Jan. 21, 1885, Over Mississippi at Hastings, Minn. .....23 St. 285

Feb. 26, 1885, Over Mississippi at Memphis, Tenn. .....23 St. 333

Mar. 3, 1885, Over Mississippi at Davenport, Iowa .....23 St. 443

Apr. 15, 1886, At Alton, Illinois.....24 St. 10

May 15, 1886, At Keithsburg, Illinois...24 St. 25

May 15, 1886, Across Illinois and Des Moines Rivers .....24 St. 27

May 15, 1886, At Winona, Minnesota...24 St. 47

May 17, 1886, At Atchison, Kansas.....24 St. 64

May 17, 1886, At Red Wing, Minnesota..24 St. 59

May 17, 1886, At Clay and Jackson Counties, Missouri.....24 St. 58

May 17, 1886, At Chamberlain, South Dakota .....24 St. 67
May 17, 1886, At Saline City, Missouri..24 St. 62
May 17, 1886, At Pierre, S. D.....24 St. 65
May 17, 1886, At Pottawattamie Co., Ia..24 St. 55
May 17, 1886, At St. Charles, Mo.....24 St. 60
July 10, 1886, At St. Joseph, Mo.....24 St. 138
July 19, 1886, At Dubuque, Ia.....24 St. 144
July 29, 1886, Over Tennessee and Cumberland Rivers .....24 St. 165
Feb. 3, 1887, At St. Louis, Mo.....24 St. 375
Mar. 3, 1887, At Keokuk, Ia., or Fort Madison, Ia. .....24 St. 564
Mar. 3, 1887, At Grand Tower, Ill.....24 St. 546
Mar. 3, 1887, At Sibley, Mo.....24 St. 493
Mar. 3, 1887, At Omaha, Neb.....24 St. 501
Mar. 3, 1887, At Pierre, S. D.....24 St. 561
Mar. 3, 1887, At Yankton, S. D.....24 St. 562
May 15, 1886, Over Yellowstone at Miles City, Mont. .....24 St. 48
May 15, 1886, Over Illinois and Des Moines Rivers .....24 St. 27
May 17, 1886, Over Missouri at Atchison .....24 St. 64
June 16, 1886, Over Staten Island Sound, N. Y. .....24 St. 78

July 29, 1886, Over Tennessee River at Aurora, Tenn. .....24 St. 165

July 29, 1886, Over Willamette River, at Salem, Oregon .....24 St. 163

July 29, 1886, Over Willamette River, at Oregon City, Oregon...24 St. 164

Jan. 3, 1887, Over St. Louis River near Duluth, Minn. .....24 St. 356

Feb. 21, 1887, Over Tradewater River, Ky. .....24 St. 407

Mar. 3, 1887, Over Coosa River in Alabama .....24 St. 502

Mar. 3, 1887, Over East River, N. Y.....24 St. 468

Mar. 3, 1887, At Alexandria, La.....24 St. 508

Mar. 3, 1887, Over Red River near Crookston, Minn. .....24 St. 475

Mar. 3, 1887, Over Red River near Grand Forks, N. D.....24 St. 470

Mar. 3, 1887, Over Tennessee at Guntersville, Ala. .....24 St. 566

Mar. 3, 1887, Over Tennessee at Mussel Shoals, Ala. .....24 St. 633

Mar. 3, 1887, Over Tennessee at Sheffield, Alabama .....24 St. 558

Feb. 17, 1888, Over Missouri near St. Charles, Mo. .....25 St. 34

Feb. 18, 1888, Over Missouri near Lexington, Mo. .....25 St. 39
Apl. 4, 1888, Over Ouachita and Saline, Arkansas .....25 St. 76
Apl. 9, 1888, Over St. Mary's, Satillo and Crooked, Ga. and Fla. .....25 St. 82
Apl. 24, 1888, Over Mississippi at Memphis, Tenn. .....25 St. 92
May 1, 1888, Over Red and Little, Ark..25 St. 105
May 14, 1888, Ohio Connecting Ry. Bridge .....25 St. 139
May 14, 1888, Over Tennessee, Tenn....25 St. 144
May 14, 1888, At Little Rock, Ark.....25 St. 145
June 16, 1888, Over Cape Fear, Black and North East, N. C...25 St. 171
June 6, 1888, Over Kentucky and Tributaries .....25 St. 172
June 9, 1888, Over Tennessee at Chattanooga .....25 St. 179
June 9, 1888, Over Tennessee at Guntersville, Ala. .....25 St. 180
June 19, 1888, Over Mississippi at Hickman, Ky. .....25 St. 195
June 22, 1888, Over Missouri at Omaha, Neb. .....25 St. 198

June 25, 1888, Over Tennessee at Knoxville, Tenn. .....25 St. 204
June 29, 1888, Over Red River of the North .....25 St. 212
June 29, 1888, Over Red River of the North .....25 St. 214
July 9, 1888, Over Cumberland, Ky....25 St. 242
July 9, 1888, Over Snake and Clear Water .....25 St. 244
July 16, 1888, Over Ouachita in Arkansas .....25 St. 295
July 16, 1888, Over Columbia, between Washington and Oregon .....25 St. 296
July 16, 1888, Over Red River of the North .....25 St. 298
July 16, 1888, Over Mississippi at Oquawka, Ill. .....25 St. 299
July 16, 1888, Over Tennessee in Alabama .....25 St. 301
July 16, 1888, Over Caney Fork in Tennessee .....25 St. 302
July 16, 1888, Over Mississippi at Clinton, Iowa .....25 St. 303
July 16, 1888, Over Mississippi at Muscatine, Iowa .....25 St. 305

July 16, 1888, Over Bayou D'Arbonne, Louisiana .....25 St. 307
July 16, 1888, Over Missouri at Nebraska City, Nebraska .....25 St. 309
July 16, 1888, Over Tombigbee in Alabama .....25 St. 311
July 17, 1888, Over Missouri .....25 St. 312
July 19, 1888, Over Mississippi at Natchez, Mississippi ...25 St. 334
July 19, 1888, At Fort Smith, Arkansas.25 St. 337
July 23, 1888, Over Missouri in Missouri 25 St. 341
July 24, 1888, Over Arkansas at Cumming's Landing, Ark...25 St. 343
Aug. 6, 1888, Over Mississippi at Burlington, Ia. .....25 St. 360
Aug. 6, 1888, Over Missouri in Montana 25 St. 363
Aug. 6, 1888, Over Missouri at Forest City, Dakota .....25 St. 365
Aug. 6, 1888, Over Missouri near Winona, Dakota .....25 St. 367
Aug. 6, 1888, Over Tennessee at Lamb's Ferry, Alabama .....25 St. 369
Aug. 6, 1888, Over Hillsborough, Florida .....25 St. 370
Aug. 6, 1888, Over Halifax at Daytona, Florida .....25 St. 372

Aug. 6, 1888, Over St. John's in Florida 25 St. 373
Aug. 6, 1888, Over Oostanaula at Rome, Georgia .....25 St. 374
Aug. 6, 1888, Over Bayou Bartholomew, and Ouachita, Red, Little and Sabine, in Louisiana .....25 St. 375
Aug. 6, 1888, Over Chattahoochee in Georgia .....25 St. 378
Aug. 6, 1888, Over Flint and Chattahoochee .....25 St. 380
Aug. 7, 1888, Over Missouri .....25 St. 385
Aug. 9, 1888, Over Tennessee at Knoxville, Tennessee .....25 St. 394
Aug. 9, 1888, Over Oconee in Georgia...25 St. 395
Aug. 9, 1888, Over Missouri at Plattsmouth, Nebraska .....25 St. 396
Oct. 9, 1888, Over Kentucky and tributaries .....25 St. 548
Oct. 12, 1888, Over Missouri near mouth of Kansas River .....25 St. 555
Dec. 10, 1888, Over Kentucky and tributaries .....25 St. 636
Jan. 8, 1889, Over Tennessee and Cumberland .....25 St. 640

Feb. 25, 1889, Over Missouri at Leavenworth, Kansas .....25 St. 691

Feb. 25, 1889, Over Cumberland and Caney Fork, Tennessee...25 St. 695

Mar. 1, 1889, Over Missouri at Kansas City, Kansas .....25 St. 751

Mar. 1, 1889, Over Bayou Bartholomew at Ward's Ferry .....25 St. 752

Mar. 1, 1889, Over Tensas at Daniel's Ferry, Louisiana .....25 St. 754

Mar. 1, 1889, Over Young's Bay in Oregon .....25 St. 755

Mar. 1, 1889, Over Kentucky and tributaries .....25 St. 760

Mar. 1, 1889, Over Coosa at Gadsden, Alabama .....25 St. 769

Mar. 2, 1889, Over Mississippi near Alma, Wisconsin .....25 St. 788

Mar. 2, 1889, Over Illinois near Kampsville, Illinois .....25 St. 864

Mar. 2, 1889, Over Tallapoosa .....25 St. 866

Mar. 2, 1889, Over Tombigbee, Warrior and Tennessee, and across Grand Pass to Dauphin Island, in Gulf of Mexico .....25 St. 867

Mar. 2, 1889, Over Red in Louisiana....25 St. 879
Mar. 2, 1889, Over St. John's in Florida.25 St. 880
Mar. 2, 1889, Over Kentucky .....25 St. 882
Mar. 2, 1889, Over Missouri at Leavenworth, Kansas .....25 St. 883
Mar. 2, 1889, Over Red and Ouachita in Louisiana .....25 St. 885
Mar. 2, 1889, Over Osage in Missouri...25 St. 899
Mar. 2, 1889, Over Mississippi at Lyons, Iowa .....25 St. 901
Mar. 2, 1889, Over Green and Barren in Kentucky .....25 St. 904
Feb. 6, 1890, Over Missouri near mouth of Kansas River.....26 St. 3
Feb. 21, 1890, Over Missouri .....26 St. 11
Mar. 15, 1890, Over Arkansas in Indian Territory .....26 St. 21
Mar. 24, 1890, Over Columbia between Oregon and Washington 26 St. 25
Mar. 24, 1890, Over Missouri at Pierre, S. D. .....26 St. 29
April 9, 1890, Over Missouri .....26 St. 47
April 9, 1890, Over White River, Arkansas .....26 St. 48
April 9, 1890, Over Arkansas at Desha, Arkansas .....26 St. 51

April 26, 1890, Over Mississippi at South St. Paul, Minn.....26 St. 69

April 28, 1890, Over Red River of the North .....26 St. 75

April 30, 1890, Over Missouri at Sioux City, Iowa .....26 St. 79

May 1, 1890, Over Brazos in Texas....26 St. 80

July 11, 1890, Over Hudson at New York .....26 St. 268

Aug. 15, 1890, Over Tennessee near Guntersville, Ala. .....26 St. 313

Aug. 29, 1890, Over Mississippi between mouths of Illinois and Missouri .....26 St. 364

Aug. 29, 1890, Over Columbia .....26 St. 366

Sept. 2, 1890, Over Tennessee near Nile's Ferry, Tenn. ....26 St. 420

Sept. 25, 1890, Over Savannah .....26 St. 472

Sept. 25, 1890, Over Ocmulgee, Savannah and Oconee .....26 St. 474

Sept. 25, 1890, Over Green and Barren in Kentucky .....26 St. 476

Sept. 26, 1890, Over Chattahoochee in Georgia .....26 St. 482

Sept. 26, 1890, Over Oconee in Georgia..26 St. 483

Sept. 30, 1890, Over Indian and Banana, in Florida .....26 St. 555

Sept. 30, 1890, Over Kentucky and tributaries .....26 St. 558
Oct. 1, 1890, Over Alabama .....26 St. 564
Oct. 1, 1890, Over Missouri in Boone Co., Missouri .....26 St. 637
Oct. 1, 1890, Over Osage in Missouri...26 St. 639
Oct. 1, 1890, Over Missouri near Quindaro, Kansas .....26 St. 643
Dec. 26, 1890, Over Willamette in Oregon .....26 St. 698
Feb. 9, 1891, Over Cumberland .....26 St. 737
Feb. 13, 1891, Over Missouri near Council Bluffs and Omaha...26 St. 760
Feb. 24, 1891, Over St. Louis between Wisconsin and Minnesota .....26 St. 781
Mar. 2, 1891, At Little Rock, Arkansas..26 St. 797
Mar. 2, 1891, Over Red at Alexandria, Louisiana .....26 St. 825
Mar. 3, 1891, Over Coal Bank Slough, Oregon .....26 St. 1087
Apl. 15, 1892, Over Missouri at Chamberlain, S. D. .....27 St. 16
Apl. 15, 1892, Over Brazos in Texas....27 St. 18
May 12, 1892, Over Missouri at DeWitt, Missouri .....27 St. 30

May 12, 1892, Over Osage at Warsaw, Missouri .....27 St. 31
June 6, 1892, Over Illinois at Havana, Illinois .....27 St. 43
June 6, 1892, Over Tennessee .....27 St. 46
June 8, 1892, Over Mississippi at Moline, Illinois .....27 St. 47
June 21, 1892, Over Alabama, Warrior, Sipsey and Tennessee, all in Alabama.....27 St. 53
June 22, 1892, Over Missouri at Yankton, S. D. .....27 St. 54
June 22, 1892, Over Rio Grande at Brownsville, Texas ....27 St. 56
July 13, 1892, Over Corpus Christi Channel, Texas .....27 St. 118
July 23, 1892, Over Black in Arkansas..27 St. 265
July 27, 1892, Over Savannah .....27 St. 274
July 27, 1892, Over Tennessee in Alabama .....27 St. 279
July 30, 1892, Over Tennessee at Depositt, Alabama .....27 St. 334
Dec. 28, 1892, Over Tallapoosa and Coosa .....27 St. 412
Jan. 10, 1893, Over Columbia in Washington .....27 St. 416

Jan. 26, 1893, Over Hiwassee, Tennessee and Clinch .....27 St. 422
Feb. 3, 1893, Over Osage in Missouri...27 St. 428
Feb. 7, 1893, Over Mobile .....27 St. 431
Feb. 9, 1893, Over Warrior in Alabama 27 St. 437
Feb. 9, 1893, Over St. Lawrence.....27 St. 439
Feb. 11, 1893, Over Cahaba in Alabama..27 St. 441
Feb. 14, 1893, Over Galveston and Brazos Canal .....27 St. 446
Feb. 14, 1893, Over St. Mary's, between Georgia and Florida...27 St. 447
Feb. 14, 1893, Over Monongahela at Pittsburgh .....27 St. 448
Feb. 18, 1893, Over Monongahela .....27 St. 462
Mar. 1, 1893, Over Mississippi (Street Ry. Bridge) .....27 St. 511
Jan. 27, 1894, Over Neches and Sabine in Texas and Louisiana.28 St. 35
Mar. 9, 1894, Over Arkansas at Van Buren, Arkansas .....28 St. 39
Apl. 2, 1894, Over Calcasieu and Sabine in Louisiana and Texas.28 St. 48
Apl. 5, 1894, Over Caddo Lake near Shreveport, La. .....28 St. 50
Apl. 21, 1894, Over Sulphur in Arkansas or Texas .....28 St. 55

Apl. 21, 1894, Over Monongahela .....28 St. 57
Apl. 21, 1894, Over Little in Arkansas..28 St. 62
Apl. 24, 1894, Over St. Louis between Wisconsin and Minnesota .....28 St. 64
May 28, 1894, Over Sulphur in Arkansas .....28 St. 78
May 28, 1894, Over Missouri at Jefferson, Mo. .....28 St. 80
June 7, 1894, Over Monongahela .....28 St. 88
June 7, 1894, Over Hudson at New York .....28 St. 89
June 14, 1894, Over the Delaware at Philadelphia .....28 St. 92
July 26, 1894, Over Missouri at Lexington, Mo. .....28 St. 120
Aug. 23, 1894, Over Contoentnea Creek at Grifton, N. C.....28 St. 489
Aug. 23, 1894, Over Bayou Des Glaices and Atchafalaya, La. ...28 St. 499
Aug. 27, 1894, Over Osage in Missouri..28 St. 571
Aug. 27, 1894, Over Missouri at DeWitt, Mo. .....28 St. 573
Jan. 25, 1895, Over Fourche LaFevre and Petit Jean, Ark....28 St. 640

Feb. 1, 1895, Over Galveston Bay, Buffalo Bayou, and Clear Fork, in Texas .....28 St. 641
Mar. 2, 1895, Over Monongahela .....28 St. 702
Mar. 2, 1895, Over Tennessee at Sheffield, Alabama .....28 St. 708
Mar. 2, 1895, Over St. Louis between Wisconsin and Minnesota .....28 St. 711
Mar. 2, 1895, Over Monongahela .....28 St. 738
Mar. 2, 1895, Over Illinois at Hennepin.28 St. 739
Mar. 13, 1896, Over Missouri at Chamberlain, S. D.....29 St. 55
Mar. 28, 1896, Over Calumet .....29 St. 76
May 4, 1896, Over Corpus Christi Channel, Texas .....29 St. 111
May 28, 1896, Over Tallahatchie in Mississippi .....29 St. 190
June 11, 1896, Over Warrior .....29 St. 386
June 11, 1896, Over Cahaba in Alabama..29 St. 388
June 11, 1896, Over Allegheny .....29 St. 391
Jan. 13, 1897, Over Black in Louisiana..29 St. 485
Jan. 26, 1897, Over Monongahela .....29 St. 495
Jan. 26, 1897, Over Monongahela .....29 St. 496
Jan. 26, 1897, Over Red at Alexandria, Louisiana .....29 St. 497

Jan. 27, 1897, Over Columbia in Washington .....29 St. 501
Jan. 30, 1897, Over Cumberland and Tennessee in Kentucky.29 St. 507
Feb. 1, 1897, Over Rio Grande in Texas 29 St. 509
Feb. 8, 1897, Over Sulphur in Arkansas 29 St. 513
Feb. 8, 1897, Over Sabine between Louisiana and Texas .....29 St. 513
Feb. 17, 1897, Over Red River of the North .....29 St. 533
Feb. 26, 1897, Over Alabama in Alabama 29 St. 598
Mar. 2, 1897, Over St. Lawrence .....29 St. 603
Mar. 12, 1898, Over Bayou Bartholomew.30 St. 275
Apl. 4, 1898, Over Red in Louisiana...30 St. 351
Apl. 11, 1898, Over Loggy Bayou in Louisiana .....30 St. 352
Apl. 11, 1898, Over Red at Shreveport in Louisiana .....30 St. 355
Apl. 21, 1898, Over Black at Pocahontas, Arkansas .....30 St. 359
Apl. 29, 1898, Over Yalobusha, Miss.....30 St. 366
June 15, 1898, Over Missouri at Quindaro, Kansas .....30 St. 471
June 16, 1898, Over St. Francis Lake at Lake City, Ark.....30 St. 474

June 29, 1898, Over Alabama, near Montgomery, Ala. .....30 St. 521
June 29, 1898, Over Niagara River .....30 St. 523
July 1, 1898, Over Black in Arkansas..30 St. 650
Feb. 2, 1899, Over Savannah in Georgia 30 St. 813
Feb. 27, 1899, Over White in Arkansas..30 St. 893
Feb. 27, 1899, Over certain rivers in Alabama .....30 St. 905
Mar. 1, 1899, Over Flint in Georgia.....30 St. 967
Mar. 3, 1899, Over Tennessee at Sheffield, Ala. .....30 St. 1366
Mar. 1, 1900, Over Red at Grand Ecore, Louisiana .....31 St. 37
Mar. 1, 1900, Over Twelve Mile Bayou near Shreveport, Louisiana .....31 St. 38
Mar. 2, 1900, Over Monongahela.....31 St. 39
Apl. 12, 1900, Over Red at Alexandria, Louisiana .....31 St. 76
Apl. 30, 1900, Over Big Sandy at Kenova, West Virginia.....31 St. 163
May 4, 1900, Over Ocmulgee and Oconee, Georgia .....31 St. 168
May 25, 1900, Over Missouri at Pierre, South Dakota .....31 St. 189

June 6, 1900, Over Mississippi at St. Paul, Minnesota .....31 St. 275

Jan. 26, 1901, Over Mississippi at Gray's Point, Missouri.31 St. 741

Feb. 8, 1901, Over Clinch at Kingston, Tennessee .....31 St. 764

Feb. 12, 1901, Over Choctawhatchee in Alabama .....31 St. 784

Feb. 12, 1901, Over Rock in Illinois.....31 St. 786

Feb. 18, 1901, Over Monongahela in Pennsylvania .....31 St. 793

Feb. 18, 1901, Over St. Joseph at St. Joseph, Michigan.....31 St. 796

Feb. 23, 1901, Over Choctawhatchee at Geneva, Alabama .....31 St. 802

Feb. 25, 1901, Over Manatee River and Gasparilla Sound .....31 St. 804

Feb. 25, 1901, Over Warrior in Alabama.31 St. 806

Feb. 25, 1901, Over Tombigbee in Alabama .....31 St. 807

Feb. 25, 1901, Over Little in Arkansas..31 St. 808

Mar. 1, 1901, Over Monongahela .....31 St. 821

Mar. 2, 1901, Over Mississippi .....31 St. 954

Mar. 2, 1901, Over Cumberland at Carthage, Tennessee .....31 St. 957

Mar. 3, 1901, Over Alabama near Montgomery (Street Ry. bridge) ..... 31 St. 1088

Mar. 3, 1901, Over Red River in Louisiana ..... 31 St. 1089

Mar. 3, 1901, Over Red in Texas..... 31 St. 1454

Mar. 3, 1901, Over Nehalem Bay and River in Georgia ..... 31 St. 1456

Feb. 11, 1902, Over Current in Arkansas 32 St. 4

Feb. 21, 1902, Over Missouri at St. Joseph, Missouri ..... 32 St. 36

Feb. 24, 1902, Over Arkansas near Fort Gibson, I. T..... 32 St. 37

Feb. 24, 1902, Over Arkansas in Arkansas ..... 32 St. 38

Feb. 24, 1902, Over White in Arkansas..32 St. 40

Mar. 10, 1902, Over Missouri at Kansas City ..... 32 St. 56

Mar. 10, 1902, Over Monongahela..... 32 St. 58

Mar. 18, 1902, Over Monongahela at Morgantown, W. Va.... 32 St. 71

Mar. 18, 1902, Over East St. Andrews Bay ..... 32 St. 72

Mar. 24, 1902, Over Ouachita in Arkansas ..... 32 St. 89

Mar. 26, 1902, Over Missouri at South Omaha .....32 St. 91
Apl. 15, 1902, Over Missouri at Parkville, Missouri .....32 St. 102
Apl. 30, 1902, Over Ohio at Allegheny, Pa. .....32 St. 178
Apl. 30, 1902, Over Red in Louisiana....32 St. 181
May 3, 1902, Over White in Arkansas..32 St. 185
May 3, 1902, Over Pearl at Monticello, Mississippi .....32 St. 187
May 7, 1902, Over Chattahoochee at Columbus, Georgia ....32 St. 192
May 28, 1902, Over Columbia at Vancouver .....32 St. 277
May 28, 1902, Over Savannah .....32 St. 280
June 14, 1902, Over Waccamaw at Conway, South Carolina....32 St. 387
June 18, 1902, Over Cumberland in Tennessee .....32 St. 390
June 21, 1902, Over White in Arkansas..32 St. 396
June 27, 1902, Over Mississippi in Minnesota .....32 St. 407
June 28, 1902, Over Ashley in South Carolina .....32 St. 493
June 30, 1902, Over Monongahela in Pennsylvania .....32 St. 497

June 30, 1902, Over Emory in Tennessee 32 St. 499
July 1, 1902, Over Missouri at Pierre, South Dakota .....32 St. 65
July 1, 1902, Over Calumet in Indiana..32 St. 66
Dec. 17, 1902, Over Missouri .....32 St. 75
Jan. 8, 1903, Over Missouri at Oacoma, S. D. .....32 St. 76
Jan. 15, 1903, Over Alabama in Alabama 32 St. 77
Feb. 3, 1903, Over Clinch in Tennessee.32 St. 79
Feb. 7, 1903, Over Rainy in Minnesota.32 St. 80
Feb. 18, 1903, Over St. Francis in Arkansas .....32 St. 83
Feb. 18, 1903, Over Allegheny at Pittsburgh .....32 St. 83
Feb. 18, 1903, Over Monongahela.....32 St. 83
Feb. 21, 1903, Over Monongahela.....32 St. 83
Feb. 28, 1903, Over Missouri at Kansas City (St. Ry. only)....32 St. 91
Feb. 28, 1903, Over Tennessee at Lewis' Bluff, Alabama .....32 St. 92
Mar. 2, 1903, Over Pearl in Mississippi.32 St. 92
Mar. 2, 1903, Over Arkansas .....32 St. 9

APPENDIX C.

Appendix, showing bridge acts passed by Congress not containing a clause authorizing the use of such railway bridges by other companies. This list includes a number of bridges which were cited by the counsel for the appellant in the court below as intended to show that the policy of the Government was not uniform. An examination of this list will show that most of these bridges are across small and unimportant streams, and hardly seem to us to have any considerable bearing on this case.

Dec. 17, 1872, Over Ohio (cited by appellant) ..... 17 St. 398

Mar. 3, 1873, Over Genessee (cited by appellant) ..... 17 St. 610

(The road and bridge of this company were built under Act of the Legislature of New York passed April 2, 1850.)

June 23, 1874, Over Potomac (cited by appellant) ..... 18 St. 274

June 23, 1874, Over Willamette at Portland (cited by appellant) ..... 18 St. 281

Dec. 23, 1880, Over St. Mary's in Georgia (cited by appellant) 22 St. 313

(This Act authorized the construction of a one-span bridge over the St. Mary's, to be high enough to allow rafts of logs to pass under the same, and the point at which the bridge was to be built was made by the Act the head waters of navigation of the St. Mary's River.)

Aug. 8, 1882, Over St. Croix (cited by appellant) .....22 St. 370

(This bridge was authorized to be constructed over the St. Croix River between Calais, Maine, and St. Stephens, New Brunswick, and hence was to be an international bridge.)

May 29, 1884, Over Rio Grande at Laredo, Tex. (cited by appellant) .....23 St. 30

(The bridge authorized to be constructed under this Act was a street railway bridge, and was also an international bridge.)

July 5, 1884, Over Mississippi at St. Paul (cited by appellant) .....23 St. 104

(This act gave the City of St. Paul authority to construct a bridge across the Mississippi; it was not intended that any railroad bridge should be con-

structed, and no railroad bridge has been constructed under this act.

However, it is significant to note that Congress, in its act of June 6, 1900 (31 Stat. 275) authorizing the South St. Paul Belt railway to construct a bridge over the Mississippi at St. Paul, specified that all railways were to have equal rights in the use of the bridge.)

June 24, 1884, Over Willamette near Salem, Ore. (cited by appellant) .....23 St. 52

Apl. 28, 1884, Over St. Croix (cited by appellant) .....23 St. 14

Feb. 25, 1885, Over St. Croix at Stillwater, Minnesota .....23 St. 309

Mar. 2, 1885, Over Cumberland and Caney Fork near Carthage, Tennessee .....23 St. 445

May 15, 1886, Over St. Croix at Stillwater, Minnesota .....24 St. 23

May 17, 1886, Over Tennessee .....24 St. 53

July 29, 1886, Certain Bridges in Washington .....24 St. 160

May 14, 1888, Over the Black in Arkansas .....25 St. 138

June 29, 1888, Over Red at Hook's Ferry, Texas .....25 St. 210

July 19, 1888, Over Flint in Georgia....25 St. 336

Aug. 6, 1888, Over Missouri at Ponca, Nebraska .....25 St. 362

Aug. 6, 1888, Over Ocmulgee, in Georgia .....25 St. 365

Aug. 6, 1888, Over Black Warrior and Tombigbee, Ala. .....25 St. 377

Mar. 2, 1889, Over Missouri near St. Charles, Mo. .....25 St. 903

May 21, 1890, Over Oconee in Georgia...26 St. 116

Aug. 7, 1890, Over Savannah .....26 St. 311

Sept. 4, 1890, Over Boeuf, Louisiana...26 St. 422

Sept. 26, 1890, To trestle the shoal water between Cedar Point and Dauphin Island....26 St. 479

Sept. 26, 1890, Over Tennessee at Knoxville, Tennessee .....26 St. 481

Sept. 30, 1890, To bridge certain rivers in Mississippi .....26 St. 553

Dec. 26, 1890, Over Green and Barren Rivers .....26 St. 700

Feb. 9, 1891, Over Tug Fork of Big Sandy .....26 St. 736

Jan. 28, 1899, Over Missouri at Oacoma, S. D. .....30 St. 805
Feb. 15, 1900, Over Lumber, in No. Carolina .....31 St. 29
Feb. 26, 1901, Over Lumber, at Lumberton, N. C. .....31 St. 811

APPENDIX D.

Ch. 120. (12 Stat. 489.)

July 1, 1862.

An Act to aid in the Construction of a Railroad an Telegraph Line from the Missouri River to th Pacific Ocean, and to secure to the Governmen the use of the same for Postal, Military, an other purposes.

Incorporators.

Be it enacted by the Senate and House of Repr sentatives of the United States of America in Co gress assembled, That Walter S. Burgess, William H Blodget, Benjamin H. Cheever, Charles Fosdic Fletcher, of Rhode Island; Augustus Brewster, Hen ry P. Haven, Cornelius S. Bushnell, Henry Ham mond, of Connecticut; Isaac Sherman, Dean Rich mond, Royal Phelps, William H. Ferry, Henry A Paddock, Lewis J. Stancliff, Charles A. Secor, Sam uel R. Campbell, Alfred E. Tilton, John Anderso Azariah Boody, John S. Kennedy, H. Carver, Josep Field, Benjamin F. Camp, Orville W. Childs, Alexa der J. Bergen, Ben. Holliday, D. N. Barney, S. H Witt Bloodgood, William H. Grant, Thomas W. C cott, Samuel B. Ruggles, James B. Wilson, of Ne

York; Ephraim Marsh, Charles M. Harker, of New Jersey; John Edgar Thompson, Benjamin Haywood, Joseph H. Scranton, Joseph Harrison, George W. Cass, John H. Bryant, Daniel J. Morell, Thomas M. Howe, William F. Johnson, Robert Finney, John A. Green, E. R. Myre, Charles F. Wells, junior, of Pennsylvania; Noah L. Wilson, Amasa Stone, William H. Clement, S. S. L'Hommedieu, John Brough, William Dennison, Jacob Blickinsderfer, of Ohio; William M. McPherson, R. W. Wells, Willard P. Hall, Armstrong Beatty, John Corby, of Missouri; S. J. Hensley, Peter Donahue, C. P. Huntington, T. D. Judah, James Bailey, James T. Ryan, Charles Hosmer, Charles Marsh, D. O. Mills, Samuel Bell, Louis McLane, George W. Mowe, Charles McLaughlin, Timothy Dame, John R. Robinson, of California; John Atchison and John D. Winters, of the Territory of Nevada; John D. Campbell, R. N. Rice, Charles A. Trowbridge, and Ransom Gardner, Charles W. Penny, Charles T. Gorham, William McConnell, of Michigan; William F. Coolbaugh, Lucius H. Langworthy, Hugh T. Reid, Hoyt Sherman, Lyman Cook, Samuel R. Curtis, Lewis A. Thomas, Platt Smith, of Iowa; Wm. B. Ogden, Charles G. Hammond, Henry Farnum, Amos C. Babcock, W. Seldon Gale, Nehemiah Bushnell and Lorenzo Bull, of Illinois; William H. Swift, Samuel

T. Dana, John Bertram, Franklin S. Stevens, Edward R. Tinker, of Massachusetts; Franklin Gorin, Laban J. Bradford, and John T. Levis, of Kentucky; James Dunning, John M. Wood, Edwin Noyes, Joseph Eaton, of Maine; Henry H. Baxter, George W. Collamer, Henry Keyes, Thomas H. Canfield, of Vermont; William S. Ladd, A. M. Berry, Benjamin F. Harding, of Oregon; William Bunn, junior, John Catlin, Levi Sterling, John Thompson, Elihu L. Phillips, Walter D. McIndoe, T. B. Stoddard, E. H. Brodhead, A. H. Virgin, of Wisconsin; Charles Paine, Thomas A. Morris, David C. Branham, Samuel Hanna, Jonas Votaw, Jesse L. Williams, Isaac C. Elston, of Indiana; Thomas Swan, Chauncey Brooks, Edward Wilkins, of Maryland; Francis R. E. Cornell, David Blakely, A. D. Seward, Henry A. Swift, Dwight Woodbury, John McKusick, John R. Jones, of Minnesota; Joseph A. Gilmore, Charles W. Woodman, of New Hampshire; W. H. Grimes, J. C. Stone, Chester Thomas, John Kerr, Werter R. Davis, Luther C. Challiss, Josiah Miller, of Kansas; Gilbert C. Monell, and Augustus Kountz, T. M. Marquette, William H. Taylor, Alvin Saunders, of Nebraska; John Evans, of Colorado; together with five commissioners to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them,

ıd their successors, are hereby created and erected to a body corporate and politic, in deed and in law, the name, style, and title of "The Union Pacific ailroad Company;" and by that name shall have rpetual succession, and shall be able to sue and to sued, plead and be impleaded, defend and be deıded, in all courts of law and equity within the ıited States, and may make and have a common al; and the said corporation is hereby authorized d empowered to lay out, locate, construct, furnish, aintain, and enjoy a continuous railroad and teleaph, with the appurtenances from a point on the e hundredth meridian of longitude west from eenwich, between the south margin of the valley the Republican river and the north margin of the lley of the Platte river, in the Territory of Neıska, to the western boundary of Nevada Terriy, upon the route and terms hereinafter provided, l is hereby vested with all the powers, privileges, l immunities necessary to carry into effect the rposes of this act as herein set forth. The capital ck of said company shall consist of one hundred usand shares of one thousand dollars each, which ll be subscribed for and held in not more than two ndred shares by any one person, and shall be transıble in such manner as the by-laws of said corpo-

Name and title.

Location of road. (See Secs. 8 and 14 also.)

Capital $100,000,000. Amount and number of shares altered. (See Sec. 1, Act July 2, 1864—*post*).

ration shall provide. The persons hereinbefore named, together with those to be appointed by the Secretary of the Interior, are hereby constituted and appointed commissioners, and such body shall be called the Board of Commissioners of the Union Pacific Railroad and Telegraph Company, and twenty-five shall constitute a quorum for the transaction of business. The first meeting of said board shall be held at Chicago at such time as the commissioners from Illinois herein named shall appoint, not more than three nor less than one month after the passage of this act, notice of which shall be given by them to the other commissioners by depositing a call thereof in the post-office at Chicago, post paid, to their address at least forty days before said meeting, and also by publishing said notice in one daily newspaper in each of the cities of Chicago and Saint Louis. Said board shall organize by the choice from its number of a president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities in the United States as they or a quorum of them shall determine, to re-

Appointment of Commissioners to meet at Chicago.

Organization of Board of Commissioners.

Subscription books to be opened. (See Sec. 2, Act July 2, 1864, *post*).

ceive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as two thousand shares shall be in good faith subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened at least thirty days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by proxy, shall then and there elect by ballot not less than thirteen directors for said corporation; and in such election each share of said capital shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary shall then deliver over to said directors all the properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease

First meeting of stockholders.

Thirteen directors to be elected. (See Sec. 13, Act July 2, 1864, *post*).

and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. At the time of the first and each triennial election of directors by the stockholders two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and to be denominated directors on the part of the government; any vacancy happening in the government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Railroad Company. The directors so chosen shall, as soon as may be after their election, elect from their own number a president and vice-president, and shall also elect a treasurer and secretary. No person shall be a director in said company unless he shall be a bona fide owner of at least five shares of stock in the said company, except the two directors to be appointed by the President as aforesaid. Said company at any regular meeting of the stockholders called for that purpose shall have power to make by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their

Two Government directors to be appointed by the President of the United States. (*Two changed to five*—Sec. 13, Act July 2, 1864, *post.*)

Changed to *fifty shares* by Sec. 1, Act July 2, 1864.

Stockholders empowered to make by-laws, etc.

officers and servants, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock, after due notice, at such times and in such proportions as they shall deem necessary to complete the railroad and telegraph within the time in this act prescribed. Said president, vice-president, and directors shall hold their office for three years, and until their successors are duly elected and qualified, or for such less time as the by-laws of the corporation may prescribe; and a majority of said directors shall constitute a quorum for the transaction of business. The secretary and treasurer shall give such bonds, with such security, as the said board shall from time to time require, and shall hold their offices at the will and pleasure of the directors. Annual meetings of the stockholders of the said corporation, for the choice of officers (when they are to be chosen) and for the transaction of annual business shall be holden at such

Payments for stock. (See Sec. 2, Act July 2, 1864, *post.*)

Officers elected for three years. (Sec. 14, Act July 2, 1864, changed term to *one year.*)

Annual meetings of stockholders.

time and place and upon such notice as may be prescribed in the by-laws.

Right of way, 400 feet wide, granted. (See also Sec. 3, Act of July 2, 1864.)

Sec. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

Indian titles to be extinguished.

Land grant—five alternate sections on each side of road.

Sec. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of

ublic land, designated by odd numbers, to the mount of five alternate sections per mile on each ide of said railroad on the line thereof, and within he limits of ten miles on each side of said road, not old, reserved, or otherwise disposed of by the United tates, and to which a pre-emption or homestead laim may not have attached, at the time the line of aid road is definitely fixed: Provided, That all min- al lands shall be excepted from the operation of his act; but where the same shall contain timber, he timber thereon is hereby granted to said com- any. And all such lands, so granted by this section, hich shall not be sold or disposed of by said com- any within three years after the entire road shall ave been completed, shall be subject to settlement nd pre-emption, like other lands, at a price not ex- eding one dollar and twenty-five cents per acre, to paid to said company.

Equalling ten sections per mile. (Changed to 20 *sections* by Sec. 4, Act July 2, 1864, *post*.)

Ten mile limits on each side of road. (Changed to 20 mile limits by Act July 2, 1864, Sec. 4.)

Mineral lands not granted. (See Sec. 4, Act July 2, 1864.)

Lands "not sold or disposed of," etc.

Sec. 4. *And be it further enacted*, That whenever id company shall have completed forty consecutive les of any portion of said railroad and telegraph e, ready for the service contemplated by this act, d supplied with all necessary drains, culverts, via- cts, crossings, sidings, bridges, turn-outs, watering ces, depots, equipments, furniture, and all other purtenances of a first-class railroad, the rails and

Changed to "twenty consecutive miles" by Sec. 6, Act July 2, 1864.

all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of the road as far as the same is completed to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: Provided however, That no such commissioners shall be appointed by the President of the United States, unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end, which oath shall be taken before a judge of a court of record.

Patents for land to be issued.

Modified, as to issue of bonds, etc. (See Sec. 6, 7 and 8, Act July 2, 1864.)

Sec. 5. *And be it further enacted*, That, for the purposes herein mentioned, the Secretary of the Treasury shall upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually), which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles, and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds,

Sec. 10, Act July 2, 1864, changed "forty" to "twenty."

Bonds to be issued, character of, etc. (See also Sec. 8 and 10, Act July 2, 1864.)

U. S. lien "a first mortgage." Sec. 10 of Act of July 2, 1864, subordinates the United States lien to that of the first mortgage bonds of the respective companies.

or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: Provided, This section shall not apply to that part of any road now constructed.

Conditions attached to grants.

Sec. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, (*at fair and reasonable rates of compensation*, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to

All compensation for services to be retained. Changed to *one-half*, by Sec. 5, Act July 2, 1864.

he payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

Assent filed in Interior Department.

Sec. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four: Provided, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior

Sec. 5, Act of July 2, 1864, extends time of completion, one year. To be completed by July 1, 1874.

shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named: Provided, That in fixing the point of connections of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches as hereinafter provided.

Point of commencement to be fixed by the President of the United States.

Sec. 8. *And be it further enacted*, That the line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the Territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

Road through Kansas to connect with Missouri Pacific, and also with the main line at a point on the 100th meridian.

Sec. 9. *And be it further enacted*, That the Leavenworth, Pawnee, and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line, from the Missouri river, at the mouth of the Kansas river on the south side

thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the

President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich in the Territory of Nebraska.

"Central Pacific" authorized to build eastward from the Pacific coast on same terms and conditions as those upon which the the "Union Pacific" builds westward.

The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

Limits of time and mileage as to the Kansas Company.

Sec. 10. *And be it further enacted*, That the said company chartered by the State of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas River as aforesaid within two years after filing their assent to the conditions of this act, as herein provided, and one

undred miles per year thereafter until the whole is
mpleted; and the said Central Pacific Railroad
ompany of California shall complete fifty miles of
eir said road within two years after filing their
sent to the provisions of this act, as herein pro-
ded, and fifty miles per year thereafter until the
hole is completed; and after completing their
ads, respectively, said companies, or either of them,
ay unite upon equal terms with the first-named
mpany in constructing so much of said railroad and
legraph line and branch railroads and telegraph
nes in this act hereinafter mentioned, through the
erritories from the State of California to the Mis-
uri river, as shall then remain to be constructed, on
e same terms and conditions as provided in this act
relation to the said Union Pacific Railroad Com-
ny. And the Hannibal and Saint Joseph Railroad,
e Pacific Railroad Company of Missouri, and the
st-named company, or either of them, on filing their
sent to this act, as aforesaid, may unite upon equal
ms, under this act, with the said Kansas company,
constructing said railroad and telegraph, to said
eridian of longitude, with the consent of the said
ate of Kansas; and in case said first-named compa-
shall complete their line to the eastern boundary
California before it is completed across said State

Limits of time and mileage as to the Central Pacific. Changed by Sec. 5, Act July 2, 1864.

Companies may unite upon equal terms to construct unfinished road.

"Hannibal and St. Joseph" and "Pacific of Missouri" may unite with the Kansas Company in constructing. See Sec. 16 of this Act; also Sec. 16 of Act, July 2, 1864.

by the Central Pacific Railroad Company of Califo
nia, said first-named company is hereby authorized
continue in constructing the same through Califo
nia, with the consent of said State, upon the ter
mentioned in this act, until said roads shall meet a
connect, and the whole line of said railroad and te
graph is completed; and the Central Pacific Railro
Company of California, after completing its ro
across said State, is authorized to continue the co
struction of said railroad and telegraph through t
Territories of the United States to the Missouri r
er, including the branch roads specified in this a
upon the routes hereinbefore and hereinafter in
cated, on the terms and conditions provided in t
act in relation to the said Union Pacific Railro
Company, until said roads shall meet and conne
and the whole line of said railroad and branches a
telegraph is completed.

Central Pacific authorized to build to the Missouri River. See also Sec. 16, Act July 2, 1864, and Sec. 2, Act July 3, 1866.

Sec. 11. *And be it further enacted*, That
three hundred miles of said road most mountain
and difficult of construction, to wit: one hundred a
fifty miles westwardly from the eastern base of
Rocky mountains, and one hundred and fifty m
eastwardly from the western base of the Sierra
vada mountains, said points to be fixed by the Pr
dent of the United States, the bonds to be issue

Bonds for $48,000 per mile to be issued for road over the Rocky and Sierra Nevada mountains.

aid in the construction thereof shall be treble the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted be set apart upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid, that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each the bonds to be issued to aid in the construction thereof shall be double the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: Provided, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

Bonds for $32,000 per mile to be issued for road between the Rocky mountains and the Sierra Nevada mountains.

Sec. 12. *And be it further enacted*, That whenever the route of said railroad shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route, and in case of difference between them as to said location the President of the United States shall

Location of route at State lines, etc.

determine the said location; the companies named in each State and Territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri river to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line; and the companies herein named in Missouri, Kansas, and California, filing their assent to the provisions of this act, shall receive and transport all iron rails, chairs, spikes, ties, timber, and all materials required for constructing and furnishing said first-mentioned line between the aforesaid point, on the one hundredth meridian of longitude and western boundary of Nevada Territory, whenever the same is required by said first-named company, at cost, over that portion of the roads of said companies constructed under the provisions of this act.

Tracks to be of uniform width.

Road to be used as a continuous line. See also Sec. 15, Act July 2, 1864, *post*.

Sec. 13. *And be it further enacted*, That the Hannibal and Saint Joseph Railroad Company of Missouri may extend its roads from Saint Joseph, via Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of this act, upon the same terms and conditions, in all respects, for one hundred miles in length next to the Missouri river, as are provided in this act for the construction of the railroad and telegraph line first mentioned, and may for this purpose, use any railroad charter which has been or may be granted by the Legislature of Kansas: Provided, That if actual survey shall render it desirable, the said company may construct their road, with the consent of the Kansas legislature, on the most direct and practicable route west from Saint Joseph, Missouri, so as to connect and unite with the road leading from the western boundary of Iowa at any point east of the one hundredth meridian of west longitude, or with the main trunk road at said point; but in no event shall lands or bonds be given to said company, as herein directed, to aid in the construction of their said road for a greater distance than one hundred miles. And the Leavenworth, Pawnee and Western Railroad Company of Kansas

The Hannibal and St. Joseph R. R. Co. authorized to extend its road through Kansas, as a branch of the Pacific Railroad.

May connect with Union Pacific or Kansas Pacific. See also Sec. 16, Act July 2, 1864.

Leavenworth branch authorized.

may construct their road from Leavenworth to unite with the road through Kansas.

Iowa Branch to be constructed by the Union Pacific Company to the 100th meridian.

Sec. 14. *And be it further enacted*, That the said Union Pacific Railroad Company is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, upon the most direct and practicable route to be subject to his approval, so as to form a connexion with the lines of said company at some point on the one hundredth meridian of longitude aforesaid, from the point of commencement on the western boundary of the State of Iowa, upon the same terms and conditions in all respects as are contained in this act for the construction of the said railroad and telegraph first mentioned; and the said Union Pacific Railroad Company shall complete one hundred miles of the road and telegraph in this section provided for in two years after filing their assent to the conditions of this act, as by the terms of this act required, and at the rate of one hundred miles per year thereafter, until the whole is completed: Provided, That a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section and to operate said road in the

same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said company by this act. And whenever there shall be a line of railroad completed through Minnesota or Iowa to Sioux City, then the said Pacific Railroad Company is hereby authorized and required to construct a railroad and telegraph from said Sioux City upon the most direct and practicable route to a point on, and so as to connect with, the branch railroad and telegraph in this section hereinbefore mentioned, or with the said Union Pacific Railroad, said point of junction to be fixed by the President of the United States not further west than the one hundredth meridian of longitude aforesaid, and on the same terms and conditions as provided in this act for the construction of the Union Pacific Railroad as aforesaid, and to complete the same at the rate of one hundred miles per year; and should said company fail to comply with the requirements of this act in relation to the said Sioux City railroad and telegraph, the said company shall suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph hereinbefore mentioned.

Union Pacific Company authorized and required to construct Sioux City branch, so as to connect with main line. This section is amended by Sec. 17, Act July 2, 1864.

The President of the United States may prescribe connections for other roads. See R. S. § 5257.

Sec. 15. *And be it further enacted*, That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors and assigns, the same as if the words had been properly added thereto.

Wherever word Company appears shall embrace successors, assigns, etc.

Consolidation authorized. See also Sec. 10 of this Act, and Sec. 16, Act July 2, 1864, post

Sec. 16. *And be it further enacted*, That at any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act.

Sec. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an un-

reasonable time, to remain unfinished or out of repair, and unfit for use, Congress may pass any act to ensure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: Provided, That if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States: Provided, That of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada mountain, there shall be reserved of each part and instalment

Congress may ensure speedy completion.

Continuous line to be completed from the Missouri to the Sacramento by July 1, 1876. See Secs. 5 and 7, Act July 2, 1864.

This reservation repealed by Sec. 7, Act July 2, 1864.

twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road and all parts thereof provided for in this act are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each instalment fifteen per centum, to be and remain in the treasury until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

Congress may reduce rates when net earnings exceed ten per cent. of cost of road.

Sec. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable, in amount, and mav fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad

and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

Railroad Companies authorized to arrange with Telegraph Companies. See also Sec. 15, Act July 2, 1864, *post*.

Sec. 19. *And be it further enacted*, That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri River and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfillment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated with-

out prejudice to the rights of said railroad companies named herein.

Annual report to the Secretary of the Treasury. Repealed by Act of June 25, 1868, 15 Stat., 79. This Section and the Act of June 25, 1868, were repealed by Act of June 19, 1878, 20 Stat., 169.

Sec. 20. *And be it further enacted*, That the corporation hereby created and the roads connected therewith, under the provisions of this act, shall make to the Secretary of the Treasury an annual report wherein shall be set forth—

First. The names of the stockholders and their places of residence, so far as the same can be ascertained;

Second. The names and residences of the directors, and all other officers of the company;

Third. The amount of stock subscribed, and the amount thereof actually paid in;

Fourth. A description of the lines of road surveyed, of the lines thereof fixed upon for the construction of the road, and the cost of such surveys;

Fifth. The amount received from passengers on the road;

Sixth. The amount received for freight thereon;

Seventh. A statement of the expense of said road and its fixtures;

Eighth. A statement of the indebtedness of said company, setting forth the various kinds thereof. Which report shall be sworn to by the president of

the said company, and shall be presented to the Secretary of the Treasury on or before the first day of July in each year.

Approved, July 1, 1862.

Ch. 216 (13 Stat. 356.)

An Act to amend an Act entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military, and other purposes," approved July first, eighteen hundred and sixty-two.

July 2, 1864

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the capital stock of the company entitled the Union Pacific Railroad Company, authorized by the act of which this act is amendatory, shall be in shares of one hundred dollars, instead of one thousand dollars, each, and the number of shares shall be one million, instead of one hundred thousand; and that the number of shares which any person shall hold to entitle him to serve as a director in said company (except the five directors to be appointed by government) shall be fifty shares, in-

Amount per share changed from $1000 to $100.

stead of five shares; and that every subscriber to said capital stock for each share of one thousand dollars heretofore subscribed, shall be entitled to a certificate for ten shares of one hundred dollars each; and that the following words in section first of said act, "which shall be subscribed for and held in not more than two hundred shares by any one person," be and the same are hereby repealed.

Subscriptions to capital stock, how and where made.

Sec. 2. *And be it further enacted*, That the Union Pacific Railroad Company shall cause books to be kept open to receive subscriptions to the capital stock of said Company, (until the entire capital of one hundred millions of dollars shall be subscribed,) at the general office of said company in the city of New York, and in each of the cities of Boston, Philadelphia, Baltimore, Chicago, Cincinnati and Saint Louis, at such places as may be designated by the President of the United States, and in such other localities as may be directed by him. No subscription for said stock shall be deemed valid unless the subscriber therefor, shall at the time of subscribing, pay or remit to the treasurer of the company an amount per share subscribed by him equal to the amount per share previously paid by the then existing stockholders. The said company shall make assessments upon its stockholders of not less than five

Payments on subscription.

Assessments upon stockholders.

ollars per share, and at intervals of not exceeding ix months from and after the passage of this act, ntil the par value of all shares subscribed shall e fully paid; and money only shall be receivable or any such assessment, or as equivalents for any ortion of the capital stock hereinbefore authorized. The capital stock of said Company shall not be increased beyond the actual cost of said road. And the tock of the company shall be deemed personal property, and shall be transferable on the books of the ompany, at the general office of said company in the ity of New York, or at such other transfer office as he company may establish.

Capital stock not to exceed cost of road.

Transfers of stock.

Sec. 3. *And be it further enacted*, That the Union Pacific Railroad Company, and all other companies provided for in this act, and the act to which his is an amendment, be, and hereby are, empowered o enter upon, purchase, take and hold any land or remises, that may be necessary and proper for the onstruction and working of said road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the urpose of excavation or embankment; and also any nds or premises that may be necessary and proper or turnouts, standing-places for cars, depots, station ouse[s] or any other structures required in the con-

Any land or premises may be taken for use of road—not to exceed 100 feet on each side.

struction and operating of said road. And eac

Encumbrances to be removed.

said companies shall have the right to cut and rem
trees or other materials that might, by falling,
cumber its road-bed, though standing or being n
than one hundred feet therefrom. And in case
owner or claimant of such lands or premises and
company cannot agree as to the damages, the am

Damages, how determined.

shall be determined by the appraisal of three d
terested commissioners, who may be appointed
application by any party to any judge of a cou
record in any of the territories in which the l
or premises to be taken lie; and said commissio
in their assessments of damages, shall appraise
premises at what would have been the value the
if the road had not been built; and upon return
court of such appraisement, and upon the pay
to the clerk thereof of the amount so awarde
the commissioners for the use and benefit of
owner thereof, said premises shall be deemed t
taken by said company, which shall thereby ac
full title to the same for the purposes afore

Appeal from assessment of Commissioners.

And either party, feeling aggrieved by said as
ment, may, within thirty days, file an appeal t
from, and demand a jury of twelve men to esti
the damage sustained; but such appeal shall
interfere with the rights of said company to

upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds, with sufficient surety, or sureties, for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee, as well as its own. And the payment into court, for the use of the owner or claimant, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occopy the same for the construction, maintaining, and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the territory or subject to any legal disability, the court may appoint a proper person, who shall give bonds, with sufficient surety, or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceeding shall be had in reference to the appraisement of the premises to be taken, and with the same effect, as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully

Title on payment of final award.

his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of and acquiring a title to the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners, in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road, across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant, or any other person under guardianship, to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company, which shall vest the title thereto in the said company.

Unoccupied lands, how acquired.

Sec. 4. *And be it further enacted*, That section ree of said act be hereby amended by striking out e word "five," where the same occurs in said sec- n, and by inserting in lieu thereof the word "ten;" d by striking out the word "ten," where the same curs in said section, and inserting in lieu thereof e word "twenty." And section seven of said act hereby amended by striking out the word "fif- en," where the same occurs in said section, and in- rting in lieu thereof the word "twenty-five." And e term "mineral land," wherever the same occurs this act, and the act to which this is an amend- ent, shall not be construed to include coal and iron nd. And any lands granted by this act or the act which this is an amendment, shall not defeat or npair any pre-emption, homestead, swamp land, or ther lawful claim, nor include any government res- rvation or mineral lands, or the improvements of ny bona fide settler, or any lands returned and de- ominated as mineral lands, and the timber neces- ary to support his said improvements as a miner or griculturist, to be ascertained under such rules as ave been or may be established by the Commissioner f the General Land Office, in conformity with the rovisions of the pre-emption laws: Provided, That he quantity thus exempted by the operation of this

Land-grant doubled. See Sec. 3, Act July 1, 1862.

Coal and iron lands belong to the Company.

Lands excepted from grant.

act and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist; and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation, Provided, also, that the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act or in this act. And all lands shall be excluded from the operation of this act and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an Act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land office.

What timber belongs to Company.

Other lands not granted.

Sec. 5. *And be it further enacted*, That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company be, and the

Time for designation of route extended one year.

ame is hereby, extended one year from the time in aid act designated; and that the Central Pacific Railroad Company of California shall be required to omplete twenty-five miles of their said road in each ear thereafter, and the whole to the State line with- n four years, and that only one-half of the compen- ation for services rendered for the government by aid companies shall be required to be applied to the ayment of the bonds issued by the government in id of the construction of said roads.

Only one-half of compensation for services to be retained. Amending Sec. 6, Act of July 1, 1862.

Sec. 6. *And be it further enacted*, That the pro- iso to section four of said act is hereby modified as ollows, viz.: And the President of the United States s hereby authorized, at any time after the passage f this act, to appoint for each and every of said oads, three commissioners, as provided for in the ct to which this act is amendatory; and the verified tatement of the president of the California com- any, required by said section four, shall be filed in he office of the United States Surveyor General for he State of California, instead of being presented to he President of the United States; and the said urveyor General shall thereupon notify the said ommissioners of the filing of such statement, and the aid commissioners shall thereupon proceed to ex- mine the portion of said railroad and telegraph line

Sec. 4, Act July 1, 1862, modified as to all the roads.

Affidavits to be filed in California.

Surveyor General to notify Commissioners.

so completed, and make their report thereon to the President of the United States, as provided by the act to which this is amendatory. And such statements may be filed, and such railroad and telegraph line be examined and reported on by the said commissioners, and the requisite amount of bonds may be issued, and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this act and the act to which this is amendatory, upon the construction by said railroad company of California of any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon the certificate of said commissioners that such portion is completed as required by the act to which this is amendatory. And section ten of the act of which this is amendatory is hereby amended by inserting after the words "United States" in the last clause, the words "and States intervening."

Proceedings as to California Company.

Amends Act of July 1, 1862.

Sec. 7. *And be it further enacted*, That so much of section seventeen of said act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this act or the act to which this is amendatory, shall not work a forfeiture of the rights.

Repeal of reservation of bonds required by Sec. 17, Act July 1, 1862.

Failure of one company to comply not to affect others. Sec. 17, Act July 1, 1862.

privileges, or franchise of any other company or companies that shall have complied with the same.

Sec. 8. *And be it further enacted*, That for the purpose of facilitating the work on said railroad, and of enabling the said company as early as practicable to commence the grading of said railroad in the regions of the mountains, between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the chief engineer of the said company, and said commissioners, shall certify that a certain proportion of the work required to prepare the road for the superstructure on any such section of twenty miles is done, (which said certificate shall be duly verified,) the Secretary of the Treasury is hereby authorized and required, upon the delivery of such certificate, to issue to said company a proportion of said bonds, not exceeding two-thirds of the amount of bonds authorized to be issued under the provisions of the act, to aid in the construction of such section of twenty miles, nor in any case not exceeding two-thirds of the value of the work done, the remaining one-third to remain until the said section is fully completed, and certified by the commissioners appointed by the

Partial issue of bonds authorized—modifying Sec. 11, Act July 1, 1862.

President, according to the terms and provisions of the said act; and no such bonds shall issue to the Union Pacific Railroad Company for work done west of Salt Lake City under this section, more than three hundred miles in advance of the completed continuous line of said railroad from the point of beginning on the one hundredth meridian of longitude.

Union Pacific restricted on work west of Salt Lake City.

Authorized to establish ferries and construct bridges. See Act of Feb. 24, 1871.

Sec. 9. And be it further enacted, That to enable any one of said corporations to make convenient and necessary connections with other roads, it is hereby authorized to establish and maintain all necessary ferries upon and across the Missouri River and other rivers which its road may pass in its course; and authority is hereby given said corporation to construct bridges over said Missouri River and all other rivers for the convenience of said road: Provided, That any bridge or bridges it may construct over the Missouri River or any other navigable river on the line of said road, shall be constructed with suitable and proper draws for the passage of steamboats, and shall be built, kept, and maintained, at the expense of said company in such manner as not to impair the usefulness of said rivers for navigation to any greater extent than such structures of the most approved character necessarily do. And provided further; that any company authorized by this act to construct

its road and telegraph line from the Missouri River to the initial point aforesaid may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westward of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act: Provided further, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the 100th degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.

Branch roads may connect with main line at any point west of the "initial point" on the 100th meridian of west longitude.

No bonds or lands for roads west of 100th meridian.

Sec. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road may, on the completion of each section of said road, as provided in this act and the act to which

First mortgage bonds may be issued by the Companies.

this act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies and public stores for the Government of the United States. And said section is further amended by striking out the words "forty" and inserting in lieu thereof the words "on each and every section of not less than twenty."

Lien of U. S. Bonds subordinated.

Sec. 11. *And be it further enacted*, That if any of the railroad companies entitled to bonds of the United States or to issue their first mortgage bonds herein provided for, has, at the time of the approval of this act issued or shall thereafter issue any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority o

Bonds with prior lien already or hereafter issued to or by companies to be deducted.

preference of payment to the said guaranteed bonds, or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied or uncancelled shall be deducted from the amount of such government and first mortgage bonds which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds shall be granted or permitted, as added to such outstanding, unsatisfied or uncancelled bonds of the company, shall make up the whole amount per mile to which the company would otherwise have been entitled. And Provided further, That before any bonds shall be so given by the United States, the company claiming them shall present to the Secretary of the Treasury an affidavit of the president and secretary of the company to be sworn to before the judge of a court of record setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the Secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the Secretary of the Interior. And any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and on conviction thereof, shall be punished as aforesaid.

Affidavit to be made as to amount of Company bonds outstanding.

No land or bonds for roads built prior to July 1, 1862, etc.—.

Provided also, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto under the provisions of any act or acts other than this act, and the act amended by this act.

Sec. 12. *And be it further enacted*, That the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, shall build the railroad from the mouth of Kansas River, by the way of Leavenworth, or if that be not deemed the best route, then the said company shall, within two years, build a railroad from the city of Leavenworth to unite with the main stem at or near the city of Lawrence; but to aid in the construction of said branch the said company shall not be entitled to any bonds. And if the Union Pacific Railroad Company shall not be proceeding in good faith to build the said railroad through the Territories, when the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, Eastern Division, shall have completed their road to the hundredth degree of longitude, then the last named com-

Leavenworth Branch to be built without any U. S. Bonds.

Kansas Company may build road if Union Pacific is not doing so when, etc.

pany may proceed to make said road westward, until it meets and connects with the Central Pacific Railroad Company on the same line. And the said railroad, from the mouth of Kansas River to the one hundredth meridian of longitude, shall be made by the way of Lawrence and Topeka, or on the bank of the Kansas River opposite said towns: Provided, That no bonds shall be issued, or land certified by the United States to any person or company, for the construction of any part of the main trunk line of said railroad west of the one hundredth meridian of longitude and east of the Rocky Mountains, until said road shall be completed from or near Omaha, on the Missouri River, to the said one hundredth meridian of longitude.

Kansas road by way of Topeka.

No bonds for road west of 100th meridian until, etc.

Sec. 13. *And be it further enacted*, That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five: and the President shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The Government directors

Fifteen directors to be elected; five Gov. directors to be appointed. Sec 1, Act July 1, 1862, modified.

One Gov. director on each Committee.

Gov. directors to report to

Secretary of Interior, and

shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them, touching the condition, management and progress of the work, and shall communicate to the Secretary of the Interior at any time, such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed; and while absent from home, attending to their duties as directors, shall be paid their actual travelling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide.

to visit all portions of the line.

Election of directors, when and where.

Sec. 14. *And be it further enacted*, That the next election for directors of said railroad shall be held on the first Wednesday of October next, at the office of said company in the city of New York, between the hours of ten o'clock A. M. and four o'clock P. M. of said day; and all subsequent regular elections shall be held annually thereafter at the same place; and the directors shall hold their office for one year, and until their successors are qualified.

Term of office, one year.

Roads to be used as one continuous line—reaffirming Sec. 12, Act July 1, 1862.

Sec. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said

roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line, **and in such operation and use to afford and secure to each equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies*, or adverse to the road or business of any or either of the others, and it shall not be lawful for the proprietors of any line of telegraph authorized by this act, or the act amended by this act, to refuse or fail, to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured for each offence, the sum of one hundred dollars, and such other damages as he may have suffered, on account of said refusal or failure, to be sued for and recovered in any Court of the United States, or of any State or Territory of competent jurisdiction.

Telegraph messages not to be refused.

Sec. 16. *And be it further enacted*, That any two or more of the companies authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon,

Authority to consolidate; enlarging the powers given by Sec. 16, Act July 1, 1862, and Sec. 10 of this Act.

*Italics are ours.

and as shall not be incompatible with this act, or the laws of the State or States in which the roads of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the Department of the Interior; and thereupon such organization so formed and consolidated, shall succeed to, possess and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guaranties, acts and things to be done and performed, and be subject to the same terms, conditions, restrictions and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case upon the completion by such consolidated organization of the roads or either of them of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and

forming or intended or necessary to form a portion of a continuous line from each of the several points on the Missouri River, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road, within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guaranties, acts and things to be done and performed by the government of the United States, by the President of the United States, by the

Powers and duties.

Rights and conditions.

Secretaries of the Treasury and Interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto. And said consolidated company shall pay to said defaulting company, the value, to be estimated by competent engineers of all the work done and material furnished by said defaulting company, which may be adapted and used by said consolidated company in the progress of the work under the provisions of this section: Provided nevertheless, That said defaulting company may at any time, before receiving pay for its said work and material, as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits and privileges which shall be acquired, possessed or exercised, pursuant to this section, shall be to that extent an abatement of the rights, benefits and privileges hereinbefore granted to such other company. And in case any company authorized thereto shall not enter into such

nsolidated organization, such company, upon the mpletion of its road as hereinbefore provided, shall entitled to, and is hereby authorized to continue d extend the same under the circumstances, and accordance with the provisions of this section, and have all the benefits thereof, as fully and com-tely as are herein provided touching such consoli-ted organization. And in case more than one such nsolidated organization shall be made, pursuant to s act, the terms and conditions of this act, herein-fore recited as to one, shall apply in like manner, rce and effect to the other. Provided, however, at rights and interests at any time acquired by e such consolidated organization shall not be im-ired by another thereof. It is further provided at, should the Central Pacific Railroad Company California complete their line to the eastern line the State of California before the line of the Union cific Railroad Company shall have been extended stward so as to meet the line of said first named mpany, said first named company may extend their e of road eastward one hundred and fifty miles on e established route, so as to meet and connect with e line of the Union Pacific road, complying in all spects with the provisions and restrictions of this t as to said Union Pacific road, and upon doing

Company not consolidated has equal rights with those which consolidate.

Central Pacific may build Eastward from the California line. See also Sec. 10, Act of July 1, 1862, and Sec. 2, Act of July 3, 1866.

so, shall enjoy all the rights, privileges and benefits conferred by this act on said Union Pacific Railroad Company.

Sec. 14, Act July 1, 1862, amended as to the Sioux City branch.

Sec. 17. *And be it further enacted*, That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa or Minnesota to Sioux City, such company now organized or as may hereafter be organized under the laws of Iowa, Minnesota, Dakota or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route to such a point on, and so as to connect with the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the said Union and Pacific Railroad, and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year: Provided, That said Union Pacific Railroad Company shall be, and is hereby released from the

construction of said branch. And said company constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: And provided further, that if a railroad should not be completed to Sioux City across Iowa or Minnesota within eighteen months from the date of this act, then said company designated by the President as aforesaid, may commence, continue and complete the construction of said branch as contemplated by the provisions of this act: Provided, however, that if the said company so designated by the President as aforesaid, shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then and in that case all the railroad which shall have been constructed by said company shall be forfeited to, and become the property of, the United States.

Sioux City and Pacific to be completed by March 3, 1869.

Sec. 18. *And be it further enacted*, That the Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the

Burlington and Missouri River Railroad Company of Iowa authorized to build westward to the one hundredth meridian.

laws of the State of Iowa, be and hereby is authorized to extend its road through the Territory of Nebraska from the point where it strikes the Missouri river south of the mouth of the Platte river, to some point not further west than the one hundredth meridian of west longitude so as to connect by the most practicable route with the main trunk of the Union Pacific Railroad, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude. And for the purpose of enabling said Burlington and Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet, where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side-tracks, turntables, and water stations. And the United States shall extinguish as rapidly as may be, consistent with public policy and the welfare of the said Indians, the Indian

Grant of right of way over public lands.

Indian titles to be extinguished.

titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

Grant of lands to B. & M. R. R. R. Co.

Sec. 19. *And be it further enacted*, That for the purpose of aiding in the construction of said road, there be, and hereby is granted, to the said Burlington and Missouri River Railroad Company, every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers to the amount of ten alternate sections per mile on each side of said road on the line thereof and not sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed. Provided, said Company shall accept this grant within one year from the passage of this act, by filing such acceptance with the Secretary of the Interior and shall also establish the line of said road and file a map thereof with the Secretary of the Interior, within one year of the date of said acceptance, when the said Secretary shall withdraw the lands embraced in this grant from market.

Sec. 20. *And be it further enacted*, That whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive

miles of the road mentioned in the foregoing section, in the manner provided for other roads mentioned in this act, and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed as required by this act, then upon certificate of said commissioner[s] to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said road as far as the same is completed, to the amount aforesaid; and such examination, report and conveyance by patents shall continue from time to time, in like manner, until said road shall have been completed. And the President shall appoint said commissioners, fill vacancies in said commission as provided in relation to other roads mentioned in the act to which this is an amendment. And the said company shall be entitled to all the privileges and immunities granted to the Hannibal and St. Josephs Railroad Company by the said last mentioned act, so far as the same may be applicable: Provided, That no government bonds shall be issued to the said Burlington and Missouri River Railroad Company to aid in the construction of said extension of its road: And provided further,

Commissioners to examine road and report to the President.

No government bonds to the B. & M. R. R. R. Co.

That said extension shall be completed within the eriod of ten years from the passage of this act.

Cost of surveying, etc., to be paid before lands are patented.

Sec. 21. *And be it further enacted*, That before ny land granted by this act shall be conveyed to any ompany or party entitled thereto under this act, here shall first be paid into the Treasury of the Jnited States, the cost of surveying, selecting and onveying the same by the said company or party in nterest as the titles shall be required by said com- any, which amount shall, without any further ap- ropriation, stand to the credit of the proper account, o be used by the Commissioner of the General Land Office, for the prosecution of the survey of the public nds along the line of said roads, and so from year o year, until the whole shall be completed, as pro- ided under the provisions of this act.

Power of Congress to alter or amend. See Sec. 18, Act July 1, 1862.

Sec. 22. And be it further enacted, That Con- ress may at any time alter, amend, or repeal this act.

Approved, July 2, 1864.

Ch. 246. (14 Stat. 244.)

July 25, 1866.

An Act to authorize the construction of certain bridges, and to establish them as post roads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Bridge may be built across the Mississippi River at Quincy, Illinois, and railroad tracks laid thereon.

That it shall be lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge, under the limitations and conditions hereinafter provided. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches.

Trains may cross for compensation.

Question of obstruction to navigation may be tried where.

Bridge may be built with draw or unbroken spans.

Sec. 2. *And be it further enacted*, That any bridge built under the provisions of this act may, a

the option of the company building the same, be built as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river and not less than three hundred feet in length: *And provided also*, That if any bridge built under this act shall be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; the said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current

Height, if made with unbroken spans.

Length of spans.

Pivot drawbridge, with draw over main channel, and spans, etc.

Draw to be opened promptly, except, etc.

of the river: *And provided also*, That said draw shal be opened promptly upon reasonable signal for th passage of boats, whose construction shall not b such as to admit of their passage under the perma nent spans of said bridge, except when trains ar passing over the same; but in no case shall unneces sary delay occur in opening the said draw during o after the passage of trains.

Bridges constructed according to this act, to be lawful structures and post routes.

Sec. 3. *And be it further enacted*, That an bridge constructed under this act, and according t its limitations, shall be a lawful structure, and sha be recognized and known as a post route; upo which, also, no higher charge shall be made for th transmission over the same of the mails, the troop and the munitions of war of the United States, tha the rate per mile paid for their transportation ov the railroads or public highways leading to the sa bridge.

Chicago, Burlington, and Quincy Railroad Company may build a railroad bridge across the Mississippi.

Sec. 4. *And be it further enacted*, That it sha be lawful for the Chicago, Burlington, and Quin Railroad Company, a corporation whose road h been completed to the Mississippi River, and co nects with a railroad on the opposite side there having first obtained authority therefor from t States of Illinois and Iowa, to construct a railro bridge across said river, upon the same terms, in t

same manner, under the same restrictions, and with the same privileges, as is provided for in this act in relation to the bridge at Quincy, Illlinois.

Bridge may be built across the river at Hannibal, Missouri;

Sec. 5. *And be it further enacted*, That a bridge may be constructed at the town of Hannibal, in the State of Missouri, across the Mississippi River so as to connect the Hannibal and Saint Joseph Railroad with the Pike County and Great Western railroads of Illinois, on the same terms and subject to the same restrictions as contained in this act for the construction of the bridge at Quincy, Illinois.

between Prairie du Chien and North McGregor;

Sec. 6. *And be it further enacted*, That a bridge may be constructed across the Mississippi River between Prairie du Chien, in the State of Wisconsin, and North McGregor, in the State of Iowa, with the consent of the legislatures of Wisconsin and Iowa, on the same terms and subject to the same restrictions as are contained in this act for the construction of the bridge at Quincy, Illinois.

between Keokuk and Hamilton;

Sec. 7. *And be it further enacted*, That the Keokuk and Hamilton Mississippi Bridge Company, a corporation existing under the laws of the State of Iowa, and the Hancock County Bridge Company, a corporation existing under the laws of the State of Illinois, be and are hereby authorized to construct and maintain a bridge over the Mississippi River be-

tween Keokuk, Iowa, and Hamilton, Illinois, of the same character, description and construction as provided in this act for the bridges at Quincy and Burlington; and the said bridge, in its use and operation, shall be subject to the same restrictions that apply to said bridges at Quincy and Burlington by the terms of this act.

between Winona and opposite bank of river;

Sec. 8. *And be it further enacted*, That the Winona and Saint Peter Railroad Company, a corporation existing under the laws of the State of Minnesota, is hereby authorized to construct and operate a railroad bridge across the Mississippi River between the city of Winona, in the State of Minnesota, and the opposite bank of the said river, in the State of Wisconsin, with the consent of the legislatures of the States of Minnesota and Wisconsin; and said bridge by this section authorized is hereby declared a post route, and subject to all the terms, restrictions, and requirements contained in the foregoing sections of this act.

between Dunleith and Dubuque;

Sec. 9. *And be it further enacted*, That a bridge may be constructed and maintained across the Mississippi River, between Dunleith, in the State of Illinois, and Dubuque, in the State of Iowa, with the consent of said States previously given or hereafter acquired, with the same privileges, upon the same

terms, and under the same restrictions as are contained in this act for the construction of a bridge at Quincy, Illinois.

at the city of Kansas;

Sec. 10. *And be it further enacted*, That any company authorized by the legislature of Missouri may construct a bridge across the Missouri River, at the city of Kansas, upon the same terms and conditions provided for in this act.

between the city of Saint Louis and East Saint Louis.

Sec. 11. *And be it further enacted*, That the "Saint Louis and Illinois Bridge Company", a corporation organized under an act of the general assembly of the State of Missouri, approved February fifth, eighteen hundred and sixty-four, and an act amendatory of the same, approved February twentieth, eighteen hundred and sixty-five, and also confirmed in its corporate powers under an act of the legislature of the State of Illinois, approved eighteen hundred and sixty-four, or any other bridge company organized under the laws of Missouri and Illinois, be, and the same is hereby, empowered to erect, maintain, and operate a bridge across the Mississippi River, between the city of Saint Louis, in the State of Missouri, and the city of East Saint Louis, in the State of Illinois, subject to all the conditions contained in said act of incorporation and amendments thereto, and not inconsistent with the following

terms and provisions contained in this act. And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said waters, the cause may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches.

Question of obstruction, where may be tried.

Bridge to be built with unbroken spans.

Sec. 12. *And be it further enacted*, That the bridge authorized by the preceding section to be built shall not be a suspension bridge, or drawbridge, with pivot or other form of draw, but shall be constructed with continuous or unbroken spans, and subject to these conditions: First, that the lowest part of the bridge or bottom chord shall not be less than fifty feet above the city directrix at its greatest span. Second, that it shall have at least one span five hundred feet in the clear, or two spans of three hundred and fifty feet clear of abutments. If the two latter spans be used, the one over the main steamboat channel shall be fifty feet above the city directrix, measured to the lowest part of the bridge at the centre of the span. Third, no span over the water at low-water mark shall be less than two hundred feet in the clear of abutments.

Conditions. Height and length of spans.

Act may be altered, etc.

Sec. 13. *And be it further enacted*, That the right to alter or amend this act, so as to prevent or

remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved.

Approved, July 25, 1866.

Ch. 67. (16 Stat. 430.)

Feb. 24, 1871.

An Act to authorize the Union Pacific Railroad Company to issue its Bonds to construct a Bridge across the Missouri River at Omaha, Nebraska, and Council Bluffs, Iowa.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, the Union Pacific Railroad Company be, and it is hereby, authorized to issue such bonds, and secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress; and said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls

Union Pacific Railroad Co. may issue bonds, etc., to construct, etc., a bridge across the Missouri river at Omaha.

Construction of bridge; tolls, etc.

Empowered, governed and limited by provisions of Act of 1866.

and charges for the use of the same; and for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the act entitled "An act to authorize the construction of certain bridges, and to establish them as post roads," approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto:

Eastern terminus of railroad not to be changed.

And provided, that nothing in this act shall be so construed as to change the eastern terminus of the Union Pacific railroad from the place where it is now fixed under existing laws, nor to release said Union Pacific Railroad Company or its successors, from its obligation as established by existing laws: *Provided also*,

Congress may regulate tolls and fares.

That Congress shall at all times have power to regulate said bridge, and the rates for the transportation of freight and passengers over the same, and the local travel hereinbefore provided for.

Amount of bonds.

And the amount of bonds herein authorized shall not exceed two and a half millions of dollars: *Provided*,

Draws.

That if said bridge shall be constructed as a draw-bridge, the same shall be constructed with spans of not less than two hundred feet in length in the clear on each side of the central or pivot pier of the draw.

Approved, February 24, 1871.